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Contextualizing the Calculus of Consent: Judicial Review of Legislative Wealth Transfers in a Transition to Democracy and Beyond¹

[I]s movement toward equality institutionally feasible? It is ironic that despite the extensive literature on distributional policy, this basic question is almost never posed, let alone answered. The virtue of the constitutional perspective is that it places this question firmly at center stage. It does so by shifting the domain of normative inquiry from the set of imaginable *income distributions* to the set of feasible *institutional arrangements* from which income distributions will emerge.²

Introduction

"For a modern judge, one of the worst insults is that she is reenacting the sin originally committed by the pre-New Deal Court in cases like *Lochner v. New York*."³ While most contemporary commentators would agree with this sentiment, one legacy of the United States Supreme Court's abandonment of *Lochner* style judicial review still evokes controversy: the facilitation of special interest politics.⁴

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1. The paper, which grew into this Article, was originally delivered at the University of Chicago's Center for the Study of Constitutionalism in Eastern Europe's Conference on Restitution, held at the Central European University on June 17-19, 1993. Stephen Holmes, Larry Lessig, Ellen Comisso, Peter Paczolay, Shlomo Avineri, Claus Offe, Dwight Semler, and Ulrich Preuss were among the numerous attending scholars who offered useful comments. In addition, I benefited from comments on the enlarged manuscript from Krisztina Morvai, Ellen Comisso, and Stephen Holmes. I am grateful for the University of Chicago Center's intellectual support of this type of research and analysis of important developments in Eastern Europe that have widespread theoretical ramifications. I am also grateful for the Soros Foundation's global funding of law reform initiatives, involvement in which enabled me to have access to much of the historically significant, first-hand information related in this Article.

2. GEOFFREY BRENNAN & JAMES M. BUCHANAN, *THE REASON OF RULES: CONSTITUTIONAL POLITICAL ECONOMY* 117 (1985) (emphasis in original).

3. 1 BRUCE ACKERMAN, *WE THE PEOPLE: FOUNDATIONS* 40 (1991).

4. For a bibliography of historical analyses that consider the primary function of *Lochner* era constitutionalism as "combatting special privilege, i.e. instances when a legislature displayed favoritism or unreasonably rewarded one constituency at the expense of another," see Herbert Hovenkamp, *The Political Economy of Substantive Due Process*, 40 27 CORNELL INT'L L.J. 303 (1994).

During the *Lochner* era,⁵ the judiciary stunted special interest politics by strictly scrutinizing legislative wealth transfers⁶ to particular classes.⁷ The Supreme Court struck down legislation intended to benefit the economic positions of bakers,⁸ women laborers,⁹ construction workers,¹⁰ theater ticket buyers,¹¹ established ice companies,¹² and gasoline consumers,¹³ among others. The rationale for these decisions, reached under the due process clause, echoed Thomas Cooley's constitutional philosophy that legislatures lack authority to pass laws intended "purely for the promotion of private interests" rather than "the general welfare,"¹⁴ or as Cooley's contemporary heir, the self-described "constitutional political economist" James M. Buchanan would put it, "genuine 'publicness.'"¹⁵

Since the *West Coast Hotel Co. v. Parish*¹⁶ decision ushered in the New

STAN. L. REV. 379, 392 & n.68 (1988). Much of the special interest legislation struck down during the *Lochner* era was not the product of pressure group politics as we know it today, rather such legislation was then the product of paternalistic impulses on the part of the legislature. *Id.* at 416-18.

5. This era lasted roughly from 1905 through 1937.

6. The term "legislative wealth transfer" signifies a government decision to grant a special benefit to a particular interest group. A wealth transfer need not take the form of an explicit entitlement to a sum of money; the effect need only be to facilitate or to subsidize a particular class in connection with economic related matters. The term derives from the economic literature that models legislatures as firms supplying benefits (wealth transfers) to competing interest groups in the form of legislation. *See, e.g.,* ROBERT E. MCCORMICK & ROBERT D. TOLLISON, *POLITICIANS, LEGISLATION, AND THE ECONOMY: AN INQUIRY INTO THE INTEREST-GROUP THEORY OF GOVERNMENT* (1981).

7. Strict scrutiny did not mean that all legislation that supported a particular group was invalidated by the *Lochner* era courts. Many laws aimed at special interests were upheld when the record indicated sufficient externalities to consider the legislature's objective to have been in the public interest. *See* Hovencamp, *supra* note 4, at 443-44 (explaining the Court's upholding of special benefits for women in *Muller v. Oregon*, 208 U.S. 412 (1908) (upholding limit on working hours for women) as based upon finding of externalities, rather than finding that women had special needs).

8. *Lochner v. New York*, 198 U.S. 45, 57 (1905) (striking down "labor law" intended to benefit bakers because "interest of the public" would not be "in the slightest degree affected").

9. *Adkins v. Children's Hosp.*, 261 U.S. 525, 559 (1925) (striking down minimum wage laws for women as "naked, arbitrary exercise" of legislative authority); *see also* *Morehead v. New York ex rel. Tipaldo*, 298 U.S. 587 (1936) (same).

10. *Conally v. General Constr. Co.*, 260 U.S. 385 (1926) (striking down minimum wage laws for construction workers).

11. *Tyson & Bro. v. Banton*, 273 U.S. 418 (1927) (invalidating regulation of theater ticket resale prices).

12. *New State Ice Co. v. Liebmann*, 285 U.S. 262 (1932).

13. *Williams v. Standard Oil Co.*, 278 U.S. 235 (1929) (invalidating gasoline price regulation).

14. THOMAS M. COOLEY, *A TREATISE ON THE CONSTITUTIONAL LIMITATIONS WHICH REST UPON THE LEGISLATIVE POWER OF THE STATES OF THE AMERICAN UNION* 1227-28 n.2 (8th ed. 1927).

15. JAMES M. BUCHANAN, *EXPLORATIONS INTO CONSTITUTIONAL ECONOMICS* 310 (1989) (describing "genuine 'publicness'" as state action that either (1) protects property rights or (2) enforces contracts or (3) "provide[s] . . . those goods and services that are inherently nonrival in consumption and that are not amenable to efficient means of exclusion" and that are "available on equal-access terms to all persons").

16. 300 U.S. 379 (1937) (determining, after much discussion of "relatively weak" position of women, that minimum wage law for women is "in the interests of the com-

Deal era by upholding a minimum wage law for women, the Supreme Court has changed its stance on legislative wealth transfers. The Court now routinely dismisses claims that legislation unconstitutionally offers benefits to only a special interest.¹⁷ Today, "general welfare" is such a broad concept that even the flimsiest of "rational objectives" is sufficient to fend off a constitutional challenge to a legislative wealth transfer.¹⁸

To this day, however, many law and economics scholars condemn the constitutional espousal of special interest politics as an irrational move.¹⁹

munity"). However, *West Coast Hotel* was arguably in the *Lochner* tradition of upholding special interest legislation when sufficient externalities existed to show that the legislation was in fact "public regarding." See *supra* note 7.

17. See, e.g., *Regan v. Taxation with Representation of Wash.*, 461 U.S. 540 (1983) (upholding constitutionality of government decision to subsidize veterans groups' speech and to deny other private groups same treatment); *Zobel v. Williams*, 457 U.S. 55 (1982) (Brennan, J., concurring) (Constitution permits legislation intended to benefit particular class with "special need").

18. See *Dandridge v. Williams*, 387 U.S. 471, 520 (1970) (Marshall, J., dissenting) (arguing that "the extremes to which the Court has gone in dreaming up rational bases for state regulation" in the post-*Lochner* era has gone too far); see also *McGowan v. Maryland*, 366 U.S. 420, 426 (1961) ("A statutory discrimination will not be set aside if any state of facts reasonably may be conceived to justify it.").

However, such deference is not always uniform with respect to judicial review of legislative justifications for discrimination that infringes upon economic rights. Justice Clarence Thomas, writing for the majority, recently struck down an Oregon ordinance for failing to "regulate[] evenhandedly" the waste disposal industry. *Oregon Waste Sys., Inc. v. Department of Envtl. Quality*, 62 U.S.L.W. 4209, 4211 (U.S. Apr. 5, 1994) (quoting *Hughes v. Oklahoma*, 441 U.S. 322, 336 (1979) (finding Commerce Clause violation)). In dissent, Chief Justice Rehnquist and Justice Blackmun, the Court's two most senior justices, reflected post-*Lochner* deference to the asserted legislative justification and expressed dismay that the majority would leave behind case law from the early 1980s in favor of a "myopic focus on 'differential fees.'" *Oregon Waste Systems*, 62 U.S.L.W. at 4214 (Rehnquist, C.J., dissenting) (finding legislative justification legitimate and rejecting majority's "crank[ing of] the dormant Commerce Clause ratchet . . . [to] tie[] the hands of the States in addressing the vexing national problem of solid waste disposal"). A few weeks later, Chief Justice Rehnquist and Justice Blackmun joined again, along with Justice Souter, to lambast the majority for yet another decision striking down a local ordinance as an unconstitutional discrimination against economic rights. *C & A Carbone, Inc. v. Clarkstown*, 62 U.S.L.W. 4315, 4323-29 (Souter, J., dissenting) (May 17, 1994). In *C & A Carbone*, the dissenters resorted to the ultimate weapon: quoting from Justice Holmes' *Lochner* dissent. *Id.* at 4327 (quoting *Lochner v. New York*, 198 U.S. 45, 75 (1905) (Holmes, J., dissenting)).

19. See, e.g., BERNARD H. SIEGAN, *ECONOMIC LIBERTIES AND THE CONSTITUTION* 265-303 (1980); Richard Epstein, *Taxation, Regulation, and Confiscation*, 20 OSGOODE HALL L.J. 433 (1982); Richard A. Epstein, *Modern Republicanism—Or the Flight from Substance*, 97 YALE L.J. 1633, 1641 (1988) (describing how upholding legislative wealth transfers "leads to a greater dissipation of private and social wealth" and "is the description of [the] disease, not of a healthy political society") (citing Anne O. Krueger, *The Political Economy of the Rent-Seeking Society*, 64 AM. ECON. REV. 291 (1974)); Christopher T. Wonnell, *Economic Due Process and the Preservation of Competition*, 11 HASTINGS CONST. L.Q. 91 (1983); see also Michael Conant, *Antimonopoly Tradition Under the Ninth and Fourteenth Amendments: Slaughter-House Cases Re-Examined*, 31 EMORY L.J. 785 (1982).

More moderate voices for a greater role for judicial review of special interest legislation include Erwin Chemerinsky, *The Supreme Court, 1988 Term—Foreword: The Vanishing Constitution*, 103 HARV. L. REV. 43, 46-47, 78, 80-81 (1989); Jerry L. Mashaw, *Constitutional Deregulation: Notes Toward a Public, Public Law*, 54 TUL. L. REV. 849, 874-75 (1980); Jerry L. Mashaw, *The Economics of Politics and the Understanding of Public Law*, 65 CHI-

They argue that special interest transfers enable well-organized minority factions to allocate goods inefficiently and selfishly, to the detriment of the diffuse and unorganized majority and ultimately the entire society.²⁰ Such arguments address not only efficiency concerns, but also send a message that interest groups "undermin[e] democracy" and the sacred will of the people.²¹

Not only have segments of academia decided that deference to legislative wealth transfers is irrational, but disdain for special interest domination is a growing sentiment in the political arena.²² The attempts by the Clinton Administration to create easily accessible, national discussion of such issues as NAFTA and health care signify an effort to bypass the influence of special interests and to sell the Administration's agenda directly to a broad audience. The appeal of "electronic nationwide townhall" proposals and candidates' defiant refusals to accept money from political action committees further indicates that the acceptance of a political process guided by bargaining among special interests is still subject to rethinking. Indeed, thirty years ago, Buchanan predicted that the "excessive" "external costs involved in this continuous struggle for interests" would eventu-

KENT L. REV. 123, 146 n.66 (1989); Frank I. Michelman, *Politics and Values or What's Really Wrong with Rationality Review*, 13 CREIGHTON L. REV. 487, 500-02 (1979); Cass R. Sunstein, *Interest Groups in American Public Law*, 38 STAN. L. REV. 29 (1985); Cass R. Sunstein, *Naked Preferences and the Constitution*, 84 COLUM. L. REV. 1689 (1984) [hereinafter *Naked Preferences*].

Gerald Gunther's criticism of deferential equal protection review of legislation affecting economic rights, see Gunther, *The Supreme Court 1971 Term—Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1, 20-21, 23 (1972), is often misinterpreted as a call for a return to *Lochner*. See, e.g., RICHARD POSNER, *ECONOMIC ANALYSIS OF LAW* 622 (4th ed. 1992) (discussing Gunther). However, as explained *infra* note 183, Gunther endorses post-*Lochner* deference to legislative justifications and calls only for stricter review to assure that the means employed by the legislature are neither overinclusive nor underinclusive. Since legislatures are prone to set forth justifications that give the statute a "public regarding" facade, Gunther's equal protection review would require a statute to live up to its facade and provide benefits to more than just a special interest group. See *infra* part IV.

20. "To the extent that the fiscal process, and politics generally, comes increasingly to be viewed as a source for profit opportunities, unrestricted by constitutional precepts, we must predict decreasing fiscal equity along with further departures from efficiency, almost regardless of how these objectives are defined." James M. Buchanan, *Taxation in Fiscal Exchange*, 6 J. PUB. ECON. 17, 29 (1976); see also TOWARD A THEORY OF THE RENT-SEEKING SOCIETY (J. Buchanan et al. eds., 1980), especially Krueger, *The Political Economy of the Rent-Seeking Society*; J. BUCHANAN & G. TULLOCK, *THE CALCULUS OF CONSENT: LEGAL FOUNDATIONS OF CONSTITUTIONAL DEMOCRACY* (1962); George J. Stigler, *The Theory of Economic Regulation*, 2 BELL J. ECON. & MGMT. SCI. 3 (1971).

For an explanation of how petitioning costs stunt organization of majority support for or opposition to legal change, even though the benefits of such support or opposition may exceed the petitioning costs, see MANCUR OLSON, *THE LOGIC OF COLLECTIVE ACTION* 2, 11-16 (2d ed. 1971).

For further explanation of this phenomenon and proposed remedies, see *infra* part I.

21. Einer R. Elhauge, *Does Interest Group Theory Justify More Intrusive Judicial Power?*, 101 YALE L.J. 31, 63 (describing message sent by legal scholars using interest group theory).

22. *Id.* at 64 ("[P]ersons of all political stripes decry the excessive political influence of interest groups. Excessive interest group influence thus appears to be a universal problem recognized and condemned by all observers.").

ally lead to a popular backlash against the growth of special interest politics: "As more and more groups organize to secure political support, and as more and more discriminatory action does come to characterize separate political decisions, reaction will surely set in at some point."²³

A quick reading of popular American academic literature and recent American political rhetoric on legislative wealth transfers could easily convince a contingent of constitutional court justices in one of Eastern Europe's new democracies that they should guide the national political process away from domination by special interest bargaining.²⁴ For example, Nobel Prize winner Buchanan has explicitly asserted that a system with strict constitutional constraints upon wealth transfers "is the only one that is wholly consistent with what we may legitimately call 'democracy' or with a social order that embodies 'democratic values,'" as opposed to "a quasi-Marxist and exploitative view of government process."²⁵ Such statements by a leading Western thinker can strongly impact many East European leaders, who desperately and sincerely seek guidance on how to bring their countries from Communism to Western-style democracy.

Ironically, this American opposition to special interest legislation—a movement often associated with the American right—has a special appeal for jurists trained in Marxist-Leninist law schools filled with the "continuous propaganda of the value of equality . . . as the formally equal distribution of benefits."²⁶ Moreover, strict constitutional rules against special interest legislation strike a favorable intellectual chord with certain individuals trying to leave the Communist era behind. After Communism's metaphysical "mission" and pseudo-scientific pursuit of the public good led to the state serving a select minority at a terrible expense to the rest of society, significant segments of post-Communist society view the transition as a chance for the empowerment of technical experts to rescue the "general welfare."²⁷ Constitutional rules against special interest legislation are attractive to these segments because such rules stunt special interest wealth transfers by requiring a scientifically verifiable connection to the furtherance of the public good, rather than just a vague post-*Lochner* objective.²⁸

Susceptibility to such outside influence may well underlie what tran-

23. BUCHANAN & TULLOCK, *supra* note 20, at 290.

24. See Ethan Klingsberg, *Judicial Review and Hungary's Transition from Communism to Democracy: The Constitutional Court, The Continuity of Law, and the Redefinition of Property Rights*, 1992 B.Y.U. L. REV. 41, 136-38 (discussing influence Western rhetoric has on Eastern Europe's post-Communist legal framers).

25. Buchanan, *supra* note 20, at 28-29.

26. Peter Paczolay, *Judicial Review of the Compensation Law in Hungary*, 13 MICH. J. INT'L L. 806, 814 (1992) (describing common perceptions of "constitutional" principles in post-Communist culture).

27. See Klingsberg, *supra* note 24, at 134-36 & nn. 235-41 (discussing evidence that "the scientific policy ideal" characterizes the transition from Communism) (citing survey showing that people voted for experts rather than parties or platforms).

28. Cf. Hovencamp, *supra* note 4, at 379-80 (explaining *Lochnerian* judicial review as growing out of American intellectual trend marked by "obsession in the social sciences with measurement and verification").

spired during the 1990-91 term at the Hungarian Constitutional Court.²⁹ During this important first eighteen months of the Court's existence, the only judicial organ in Hungarian history with the authority to exercise constitutional review issued a critical decision that appeared to implement a *Lochner*-era approach to legislative wealth transfers.³⁰

Over the next three years, the Hungarian Constitutional Court underwent a shift away from *Lochnerian* review of wealth transfers to limited acceptance of the products of special interest politics. The Court's stance is now much closer to the U.S. judiciary's deferential approach, although significant differences remain. The enticing literature of pro-*Lochner* scholars, which was once so popular among certain figures at the Hungarian Constitutional Court, lost influence. This Article analyzes the political economy of the Hungarian Court's historic shift to show why this movement away from *Lochner* was rational.

Part I explains the concept of "fiscal constitutionalism," as developed by American political economists over the last thirty years. The fiscal constitutionalists recognize special interest transfers' sub-optimality. They then build upon this recognition and, like the many advocates of distributional justice reforms, respond by attempting to fashion a means to avoid the economic pitfalls emerging from our current system of pressure group politics and transfers.

Part I describes the *Lochnerian* constitutional checks on all transfers advocated by the fiscal constitutionalists and contrasts this approach with the outcome oriented legislative plans endorsed by the distributional justice advocates. What distinguishes fiscal constitutionalism from distributional justice is the former's focus on the rational calculus that drives political actors to endorse or to reject special interest politics. According to fiscal constitutionalists, all distributional justice blueprints would

The response to Communism described above seems to have been quickly superseded once the new democracies failed to bring about immediate economic improvements. In post-Communist societies most people now appear to have given up on the entire idea of the state pursuing a broad-based public good, regardless of the expertise available to the state, and see primarily the potential for state action to serve narrow special interests. See *infra* part II.A. See generally Ethan Klingsberg, *Rebuilding Civil Society: Constitutionalism and the Post-Communist Paradox*, 13 MICH. J. INTL. L. 865 (1992) (explaining crisis of post-Communist civil society).

29. At that time, I was serving as a Counselor to the Court's Chief Justice and frequently providing him and his clerks with works like Richard Epstein's *Takings: Private Property and The Power of Eminent Domain*, which includes a controversial call for curbing legislative influence to any but a limited set of "common pool" matters. See RICHARD A. EPSTEIN, *TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN* 195-228, 307-08 (1985) (only in "common pool" matters is state able to interfere without providing just compensation); *id.* at 315-16 (opposing legislative transfers). In addition, one of the Court's chief clerks attended a Federalist Society conference in the United States and returned deeply impressed by Professor Epstein's presentation.

30. The Court commenced operation in January 1990. This Article concentrates on the Court's review of a series of controversial pieces of special interest legislation: enactments and bills providing benefits to victims of Communist property confiscations. See *infra* notes 94-95 and accompanying text. The last three years provided little other case law by the Court to evaluate when tracking the trends discussed herein.

require a benevolent dictator for implementation, because no majority of rational actors would ever choose to restrict special interest transfers when the setting is the day-to-day legislative bargaining of democratic politics. By contrast, the fiscal constitutionalism school argues, rational actors will endorse restrictions upon special interest wealth transfers willingly when the setting is decision making about long term constitutional rules.

Part I then points out that the long term constitutional perspective dreamed of by the fiscal constitutionalists seemed doomed to ivory tower debates until Eastern Europe decided to undertake wholesale constitutional reform after the collapse of Communism in 1989. This part describes why the Hungarian Constitutional Court was in an ideal position to exercise this constitutional perspective on special interest transfers. The text of the Hungarian Constitution, while ambiguous, provided tools for setting forth such rules against special interest transfers. Moreover, institutional factors unique to the Court during its first years of existence immunized the Court from the usual handicaps that prevent a court from setting forth rational political economic rules. Part I concludes that evaluation of the constitutional rules the Hungarian Court developed offers a unique opportunity for testing the fiscal constitutionalism thesis that the rational decision from a constitutional perspective is to set forth rules restricting special interest transfers. Moreover, this part foreshadows those hermeneutic flaws with fiscal constitutionalism that were uncovered by the Hungarian Court's eventual development of constitutional rules *facilitating* special interest politics.

Part II moves from theoretical background to concrete decision making. This section relates the Constitutional Court's path toward and then away from fiscal constitutionalism. Part II includes analysis of Court opinions and the political background against which those opinions were issued.

Part III then shows why the "rational" arguments in favor of *Lochner*-style restrictions on special interest politics set forth by fiscal constitutionalists, whose adherents are among those active in advising new democracies,³¹ simply did not make sense as constitutional rules in an East

31. Although I am not a doctrinal follower, I have on numerous occasions discussed the insights of Epstein and Buchanan during my stints as Counselor to the Chief Justice of the Hungarian Constitutional Court and as lecturer and organizer at numerous seminars, workshops, and courses throughout the former Communist regions (from Budapest to Bishkek) on behalf of the Soros Foundations. Other groups, such as George Mason University's Institute for Humane Studies, have similarly explained these "conservative" law and economic theories abroad and been criticized by left wing colleagues back home, in the words of one American law professor, "for trying to sell abroad what they cannot even sell at home." "Trying to sell" is an unfair metaphor for what is simply teaching, especially when the atmosphere is that of an American style give-and-take seminar. Even if some of the advice offered by American "experts" over the last three years was skewed toward the American context or a particular ideological bent, those exposed to the stimulating atmosphere of these programs will be able to come around to a rational outcome suitable to their own context, as this Article's analysis implies. All of these programs functioned as an important source of intellectual fuel in a region where knowledge of jurisprudence, political theory, and economics was at a pitiful low.

European transition from state socialism to republican democracy. When determining what constitutional rules would result from a rational calculus, the fiscal constitutionalists underestimated the role of context. The fiscal constitutionalists were correct in arguing that the considerations that influence rational decisions made from a normal legislative perspective differ from those considerations that influence rational decisions made from a constitutional perspective. However, their vision of a rational constitutional calculus neglected the hermeneutic truth that what is rational can never emerge from a *tabula rasa*, but must emerge from a set of contextual factors. These contextual factors may well render irrational, as was the case here, what Western academics perceive to be optimal rules. Part III explains the three most important contextual factors that, contrary to conventionally accepted political economic wisdom, render it rational for emerging Eastern European democracies to adopt constitutional rules facilitating special interest transfers.

Part IV shows how the Constitutional Court abandoned a *Lochner* approach for a slightly different path than that chosen by the post-*Lochner* U.S. Supreme Court. Part IV examines how the path chosen by the Hungarian Court informs contemporary debates in the United States over the future of equal protection jurisprudence. Thus, this article draws a range of related lessons, for both American economists and jurists, from the Hungarian Constitutional Court's roller coaster ride from strong endorsement to rejection of *Lochner*-style review of wealth transfers during its first three years of existence.

I. Fiscal Constitutionalism: The Quest to Synthesize Rational Economic Calculus with Constitutional Rulemaking

Economists over the last three decades have dedicated a great deal of energy to analyzing the calculus of consent that underlies legislation and regulation in a democracy.³² The conclusion reached overwhelmingly in such analyses is that allegiance to special interests has come to play an authoritative role in such calculi, and therefore democratic consent currently tends almost exclusively to support sub-optimal³³ economic bar-

32. See, e.g., Gary Becker, *A Theory of Competition Among Pressure Groups For Political Influence*, 98 Q.J. ECON. 371 (1983); see also *infra* note 131 (discussing analyses by Becker and others that indicate that special interest bargaining in legislatures has certain constructive characteristics).

33. Criticism of legislative wealth transfers as "sub-optimal" usually signifies that the gains to the interest groups are smaller than the losses to the society as a whole resulting from the legislative wealth transfer. Critics of special interest wealth transfers use different standards to measure variations from Pareto optimality: majoritarianism (benefits a greater number of persons than it hurts), wealth maximization (benefits some by a greater number of dollars than it hurts others), utility maximization (same with utility), and distributive justice (brings society closer to a given "just" distribution). See Elhauge, *supra* note 21, at 58-59.

Buchanan concedes that strict enforcement of constitutional rules against special interest transfers may "prevent the attainment of the Pareto frontier in many cases"; however, he concludes that "the degree of possible inefficiency may be relatively small

gains that transfer wealth to, or otherwise subsidize, narrow interests.³⁴ Some economists have even gone so far as to condemn the bargains that typically emerge from contemporary politics as not only sub-optimal but also antidemocratic, because the transfers benefit minority factions at the expense of the majority.³⁵

A. The Evils of Legislative Wealth Transfers to Special Interests

Economists denounce special interest legislation for a variety of reasons. First, state giveaways inspire the "socially-wasteful" dedication of resources to nonproductive rent-seeking³⁶ conduct by interest groups.³⁷ Second, the availability of wealth transfers provides disincentives to dedicate energy toward productive ends.³⁸

Third, competition for special interest transfers drives a society toward increased factionalization and may even inspire secessionism.³⁹ One of many possible contributing factors to the alarming trend of secessionism throughout the former Communist world is the unique intensity of rent-seeking competition there. After the collapse of Communism, the state continued to function as the main source of resources, while the police state's restraints upon factionalism were replaced with civil liberties (without any accompanying traditions of civility in relations between factions). Fierce competition among society's desperately needy ethnic groups to turn the post-Communist state into their sponsor led to calls for cleansing the population of rent-seeking competitors and the formation of separate states. A destructive legacy of Marxist-Leninism is the popular belief that the state can play the role of savior by wealth transfers.⁴⁰

compared with the potentiality" for sub-optimality that emerges from special interest politics. Buchanan, *supra* note 20, at 24.

34. See *supra* note 20; Frank H. Easterbrook, *Foreword: The Court and the Economic System*, 98 HARV. L. REV. 4, 16 n.16 (1984) (bibliography of pertinent economic literature).

35. See *supra* notes 21, 25 and accompanying text.

36. "Rent-seeking" signifies efforts to transfer profits ("rents") of productive activity to a privileged few.

37. Buchanan, *supra* note 20, at 26 (denouncing "resource wastage involved in attempts to capture and to control collective decision-making" as potentially even "swamp[ing] the potentially realizable surplus" from "public-goods provision" legislation); DENNIS C. MUELLER, *PUBLIC CHOICE II* 229-35 (1989); Robert D. Tollison, *Rent Seeking: A Survey*, 35 KYKLOS 575, 576-83 (1982). For a seminal explanation, see R.H. Coase, *The Federal Communications Commission*, 2 J.L. & ECON. 1 (1959) (explaining wasteful and quasi-corrupt consequences of rent-seeking in connection with the free distribution of broadcast frequency licenses).

38. BUCHANAN, *supra* note 15, at 320-21, 323 (describing responses to transfers); BRENNAN & BUCHANAN, *supra* note 2, at 114 (explaining distributive justice's negative effect upon efficient production from both the tax and the transfer side).

39. BUCHANAN, *supra* note 15, at 317-19 (explaining how the unrestrained democratic politics of fiscal transfers can lead to secessionism as a limit upon such politics).

40. See Herbert Kitschelt, *The Formation of Party Systems in East Central Europe*, 20 POL. & SOC'Y 7, 16-20 (1992) (describing affinity of ethnic extremists to internal economic logic of state socialism). This linking of secessionist impulses with an affinity for rent-seeking is more applicable to Slovakia and Croatia, where ethnic primordialists and

Finally, the condemnation of special interest wealth transfers stems from the economic literature establishing that such legislative action represents neither the will nor rational interest of the majority.⁴¹ This argument addresses concern for both efficiency and democratic values. Special interests can usually influence a legislature more effectively than the diffuse majority because lobbying by special interests entails minimal transaction costs in connection with the organization and the dissemination of information necessary for mobilization. In particular, special interest groups usually can overcome, more easily than the majority, the obstacles posed by such transaction costs as free riding.⁴²

B. Responding to the Evils of Special Interest Politics

The temptation, to which legal scholars often succumb, is to respond to these economic observations by advocating judicial intervention as a check upon interest group oriented laws and regulations. Another response is to advocate an optimal distribution of resources, presumably in the hope that those currently misguiding the democratic process will read about such a blueprint, become enlightened, and abandon their sub-optimal ways for a thoughtful ideal plan.

Both of these responses replace the calculus currently underlying the democratic process with a calculus removed from the democratic process. Intrusive judicial review proposals replace the calculus underlying contemporary politics with the calculus of an enlightened class of judges.⁴³ Institutional economic analyses show, however, that U.S. courts are structured in a manner that disables them from pursuing such enlightened rational economic ends.⁴⁴ The advocates of intrusive judicial review never explain

advocates of a large state sector converge, in contrast with the secessionist elements in Slovenia and the Czech Republic, which have tended to be more free market leaning.

The ethnic conflicts in Eastern Europe are actually a product of a multiplicity of factors. Ethan Klingsberg, *International Human Rights Intervention on Behalf of Minorities in Post-World War I and Contemporary Eastern Europe: Placebo, Poison, or Panacea?*, 1 *ROUNDTABLE* (forthcoming 1994) (outlining various historical and contemporary factors responsible for East European ethnic tensions and then explaining why pessimism about these ethnic conflicts may be overstated). *Roundtable* is a new interdisciplinary journal of the University of Chicago Law School.

41. For a survey of the economic literature making this point, see, e.g., Easterbrook, *supra* note 34, at 16 n.16 (supporting observation that "[l]aws that benefit the people in common are hard to enact because . . . [s]maller, more cohesive groups are more effective lobbyists." *Id.* at 15.).

42. MANCUR OLSON, *THE RISE AND DECLINE OF NATIONS* 18 (1982).

43. Elhauge, *supra* note 21, at 59-65 (judicial review as check upon interest group politics actually means imposition of substantive visions of judges upon polity).

44. See *infra* part I.D.2 (explaining the four fundamental institutional factors that prevent courts from functioning as rational economic decisionmakers: stare decisis, ex post dispute resolution context, influence of special interests on litigation process, and the focus on views of litigants and amici curiae); see also Jonathan R. Macey, *Promoting Public-Regarding Legislation Through Statutory Interpretation: An Interest Group Model*, 86 *COLUM. L. REV.* 223, 241-42 (1986) ("activists' view of the Constitution as vesting in the federal courts broad authority to strike down special interest statutes has not explained why judges are any better than legislators at regulating").

why a judge, amid such an institutional context, would adopt the rational viewpoints of learned economists.

Similarly, those endorsing distributional justice formulas never explain how they will convert lawmakers dominated by interest group politics to their plans. Due to the aforementioned information and transaction costs that facilitate special interest domination of legislative activity, the legislature is unlikely to take the initiative to constrain interest group behavior. Outcome oriented formulas for distribution of resources can be based only upon "purely *hypothetical* consent"⁴⁵ and implicitly depend upon the calculus of a "benevolent despot" for implementation.⁴⁶

C. The Fiscal Constitutionalism Response

A unique response to the disturbing findings of interest group economics attempts to synthesize the ideal of willing consent with the goal of restricting interest group transfers. This response turns to the concept of "fiscal constitutionalism" as the vehicle for salvation. According to this proposal, "organizational rules" limiting the evils of special interest wealth transfers can be implemented as part of constitution making.⁴⁷ Such rules "require that those individuals and groups securing differential benefits also bear the differential costs"⁴⁸—i.e., elimination of the evil of special interest rent-seeking by adoption of a strict *Lochnerian*⁴⁹ rule that there are no differential rents to seek.

The implicit source of the fiscal rules in the typical distributional justice plan is "externally imposed ethical criteria" that are contrary to the rational calculi of actors in the context of contemporary politics. By contrast, the fiscal constitutionalists claim to avoid "external imposition" because their limitations are based upon rules to which constitution makers, as opposed to day-to-day legislators, will gladly consent. Fiscal constitutionalism's claim to a basis in consent rests upon a distinction between the rational calculus of consent with respect to constitutional rules and with respect to "in-period"⁵⁰ or day-to-day legislation.

The basis for a distinction between "in-period" rule making and "genuine constitutional choice" is that only the latter's product (constitutional

45. BRENNAN & BUCHANAN, *supra* note 2, at 103 & n.4 (1985) (emphasis in original) (criticizing Rawls among others); see also Ronald Dworkin, *The Original Position*, 40 U. CHI. L. REV. 500 (1973).

46. BRENNAN & BUCHANAN, *supra* note 2, at 132.

47. BUCHANAN & TULLOCK, *supra* note 20, at 291. References here to the "fiscal constitutionalism school" are to the scholarship on constitutional economics by James Buchanan, Geoffrey Brennan, Gordon Tullock, Robert Tollison, and Robert McCormick, among others. Buchanan sometimes refers to this approach as that of "the Virginia school."

48. *Id.* at 292.

49. For a discussion of the *Lochner* era approach to special interest transfers, see *supra* Introduction.

50. "In-period" is the jargon used by fiscal constitutionalists to refer to the political context surrounding legislating and regulating, as opposed to constitutional rulemaking. See, e.g., BRENNAN & BUCHANAN, *supra* note 2, at 132.

rules) are "quasi-permanent."⁵¹ An aura of uncertainty about the future pervades decision making about quasi-permanent rules.⁵² Nobody knows who will be the potentially exploited party or beneficiary of tomorrow's special interest bargaining, yet everybody can tell that in the long run special interest rent-seeking will leave everybody worse off. From such a long term constitutional perspective, even supporters of special interests will perceive that a rule facilitating rent-seeking will ultimately cost each separate interest group more in the way of wealth transfers to other groups than any group itself can expect to receive from the transfers it obtains.⁵³ Moreover, the societal costs of adopting a quasi-permanent rule permitting special interest transfers are far greater than the costs of any single in-period transfer.⁵⁴ Accordingly, the fiscal constitutionalists argue, the calculus of consent to constitutional rules will be based upon "genuinely enlightened self-interests" as opposed to narrow, short term self-interests that characterize consent with respect to "in-period" politics.⁵⁵ Especially with respect to the issue of the "transfer budget," the calculus of consent will drive individuals in a constitution making setting "to select among alternatives in accordance with generally-applicable criteria of 'fairness,' 'equity,' and 'efficiency,' rather than fully identifiable self-interest."⁵⁶ Thus, the economics of constitutional creation appear to dictate that constraints upon special interest legislation can and will be installed only at the constitutional level.

D. The Rare Opportunity Presented by Eastern Europe for the Implementation of Fiscal Constitutionalism

The fiscal constitutionalism proposal, first set forth over thirty years ago,⁵⁷ seemed doomed to ivory tower debates, as there was little chance that any democracy would take time out from special interest politics and set the stage for constitutional reform of the fiscal process.⁵⁸ The monumental constitutional reform in Eastern Europe presented a rare opportunity for fiscal constitutionalism to take root.

51. Buchanan, *supra* note 20, at 27.

52. *Id.*

53. Macey, *supra* note 44, at 246-47 & n.108 (quoting McCORMICK & TOLLISON, *supra* note 6, at 127 (providing examples of how special interest groups that lobby successfully for their own special interest legislation ultimately experience a negative-sum gain due to the costs imposed by legislation benefiting other special interests)).

54. Macey, *supra* note 44, at 246-47.

55. BUCHANAN & TULLOCK, *supra* note 20, at 291.

56. Buchanan, *supra* note 20, at 27.

57. BUCHANAN & TULLOCK, *supra* note 20.

58. Arguably, constitutional reform takes place all the time in the United States through the institution of the judiciary. However, at least in the United States, institutional factors prevent courts from having the rational economic perspective that the fiscal constitutionalists attributed to constitution making. For discussion of those institutional factors and explanation of why they do not apply to the Hungarian Constitutional Court, see *infra* part I.D.2.

1. *The Hungarian Constitution's Text: Tools For Implementing Fiscal Constitutionalism*

In Hungary, the text of the post-Communist Constitution⁵⁹ provided a prospect, but not a guarantee, that fiscal constitutionalism would be implemented. The post-1989 text contained a strongly worded "takings" clause limiting state interferences with property to "exceptional" circumstances in the "public interest."⁶⁰ Such a text could be read either to restrict or to permit legislative wealth transfers.⁶¹

Article 9, as originally amended during the final months of the Communist regime, contained an explicit limitation upon special interest legislation in its prohibition against any act that violated "the principle of neutrality towards competition" without the support of a two-thirds majority.⁶² However, an amendment adopted upon the convening of the freely elected Parliament replaced this principle with the more ambiguous phrase: "The Republic of Hungary shall recognize and support the right to enterprise and the freedom of economic competition."⁶³ This watered-down phrase arguably prohibits the enactment of special interest legislation because such laws violate the constitutional mandate to "recognize and support," rather than interfere with, "economic competition." On the other hand, the amendment could be interpreted as a movement away from *Lochnerian* strictness.

The Constitution also contains an "equal protection clause"⁶⁴ and a limited list of positive social rights.⁶⁵ A legislative wealth transfer to one of these constitutionally designated special causes could not violate the equal protection clause.⁶⁶ When it comes to reviewing a standard "naked" wealth transfer by the legislature, however, the Hungarian Constitution (much like the U.S. Constitution) provides tools, although not unambigu-

59. The post-Communist Hungarian Constitution is technically the Stalinist document, but it is amended almost entirely. The revisions are the product of Roundtable negotiations with opposition representatives during the summer of 1989, ratification on October 23, 1989 by the outgoing reform Communist Parliament, and a few further amendments by over two-thirds of the first freely elected Parliament. For an analysis of the referendums and other republican processes underlying the post-Communist Constitution of Hungary, see Klingsberg, *supra* note 24, at 48-53.

60. A MAGYAR KÖZTÁRSASÁG ALKOTMÁNYA [Constitution] ch. I, art. 13(2) (Hung.) (Hungarian Constitutional Court's Official English Translation) (Dec. 31, 1990) (on file with the author) [hereinafter Hungarian Constitution].

61. Compare the discussions of the U.S. Constitution's similar takings clause in EPSTEIN, *supra* note 29, with Thomas Grey, *The Malthusian Constitution*, 41 U. MIAMI L. REV. 21 (1986).

62. A MAGYAR KÖZTÁRSASÁG ALKOTMÁNYA [Constitution] (Hung.) (as amended Oct. 23, 1989) (English translation on file with the author).

63. Hungarian Constitution, *supra* note 60, ch. I, art. 9(2).

64. Hungarian Constitution, *supra* note 60, ch. XII, art. 70/A.

65. Those positive social rights include: healthy environment, *id.* ch. I, art. 18; education, health care, family, and care for children, *see id.* ch. XII, arts. 66, 67, 70/D, 70/F.

66. This was the Hungarian Constitutional Court's holding in the first equal protection challenge to special interest legislation. Judgment of Apr. 25, 1990 (Income Tax Differential Case), Alkotmánybíróság [Constitutional Law Court], No. 9/1990 (Hung.), reviewed by L. SOLYOM, REPORT ON THE FIRST YEAR OF THE CONSTITUTIONAL COURT 47 (1991).

ous guidelines, for implementing constitutional rules proscribing special interest politics.⁶⁷

2. *The New Hungarian Constitutional Court: Ideal Vehicle for Rational Constitutional Calculus*

Whether the new Hungarian Constitution embodied fiscal constitutionalism or condoned special interest politics was to be decided by the judiciary. At this point, many law and economics scholars would immediately dismiss the possibility of Hungary adopting optimal constitutional rules, simply because these scholars perceive any court, even a detached high court like the U.S. Supreme Court, as an institutionally inadequate organ for such a task. However, judicial review in the new Hungary was designed in such a way that the institutional pitfalls usually attributed to courts by skeptical law and economics commentators do not apply.

Four institutional pitfalls hinder the capacity of most courts to interpret the text of a constitution (or statute) in a manner that reflects an optimal political economic calculus. First, courts usually must rest their decisions upon an analogy to previous decisions.⁶⁸ Case law precedents rarely reflect optimal economic rules due to special interest litigants' "policy of molding precedent through strategic settlement"⁶⁹ and the other institutional pitfalls of courts described hereinafter.

Second, the judicial role of dispute resolver drives courts to take an ex post perspective, and thereby pay "attention to today's unfortunate," at the expense of ex ante "attention to the effects of the rules" set forth in decisions.⁷⁰ Such an ex ante perspective, that of rule maker, is essential to formulating rules that promote future efficiency.⁷¹

Third, the litigation process will usually be subject to the same distortions as the political process. The diffuse majority will likely be "unable to organize efforts to influence the litigation process," while the special interests will "enjoy organizational advantages in collecting resources" and therefore "fund more frequent and more skillful litigation," just as they fund better lobbying efforts in the legislature.⁷²

Finally, courts will often overlook arguments for "the policy or rule that is best for society," because they must focus on the narrow interests of the litigants and amici curiae involved in the case.⁷³ These latter two pitfalls indicate that judicial decisions are just as likely to reflect the sub-optimality of special interest politics as is the legislature.

67. See *Naked Preferences*, *supra* note 19, at 1689 (discussing how takings clause, equal protection clause, and other provisions are "united by a common theme and focused on a single underlying evil: the distribution of resources or opportunities to one group rather than another solely on the ground that those favored have exercised raw political power to obtain what they want").

68. Easterbrook, *supra* note 34, at 7-12.

69. Elhauge, *supra* note 21, at 79.

70. Easterbrook, *supra* note 34, at 12.

71. *Id.*

72. Elhauge, *supra* note 21, at 67-68, 70, 77.

73. Elhauge, *supra* note 21, at 77.

None of these institutional pitfalls plagued the Hungarian Constitutional Court, which was the sole judicial organ with the authority to set forth binding constitutional rules.⁷⁴ As the Court was starting out in 1990, the burden of *stare decisis* was non-existent, and therefore the first concern is irrelevant.⁷⁵ In addition, the loose nature of the Court's justiciability and jurisdictional rules, as well as the Court's self-image, resulted in a vast majority of its opinions, including the ones pertinent to fiscal constitutionalism, adopting the *ex ante* position of rule maker as opposed to the *ex post* position of dispute resolver.⁷⁶

The third and fourth concerns are rendered harmless by the nature of the constitutional litigation process in Hungary. Review of new laws by the Court is routine rather than the product of organized litigation campaigns. Cost efficient acts such as an anonymous letter to the Court are sufficient to invoke review. Moreover, the Court does not limit its review to the challenges and arguments set forth in petitions and briefs. The Court actively seeks out and relies upon experts, frequently from academia, while regularly exercising its prerogative to ignore submissions from litigants.⁷⁷

In the absence of these institutional pitfalls, the Hungarian Constitutional Court was an organ with potential to undertake a rational constitutional calculus. Yet, as the next part of this Article will show, the Court eventually set forth constitutional rules that differ from those predicted by the fiscal constitutionalists. The fiscal constitutionalists had a provocative insight when they argued that the rational calculus governing constitutional rulemaking differs from that governing "in-period" legislation.⁷⁸ The fiscal constitutionalists' prediction about the rational calculus of constitutional rulemaking, however, is ironically subject to the same hermeneutic flaw that they perceived in the distributional justice literature. The fiscal constitutional school correctly perceived that the context of "in-period" legislating renders distributional justice plans presociological. Legislators acting rationally in an age of interest group politics will never implement such ideal schemes. What the fiscal constitutionalism school missed was that the context of constitutional rule making also may render the adoption of rules restraining interest group wealth transfers irrational.

Fiscal constitutionalism considers only presociological (non-contextual) economic theory when confidently relying on "the possibility of lifting the determination of the redistributive transfer budget out of the

74. See Klingsberg, *supra* note 24, at 53-80.

75. As this article will show, *stare decisis* actually dictated in favor of what Buchanan would consider optimal constitutional rules. See *infra* part II.

76. See Klingsberg, *supra* note 24, at 61-64 (explaining the Court's self-image and justiciability standards as leading to a "beyond dispute resolution" scenario); *id.* at 120-25 (explaining roots of Court's *ex ante* rule making approach in Hungarian legal tradition).

77. *Id.* at 61-64, 120-25. As demonstrated *infra* part III.B, the Hungarian Court is not institutionally blind to special interest politics. The Court permits special interest politics to influence it in a way necessary for democracy to flourish.

78. See *supra* part I.C.

jurisdiction of in-period majoritarian politics and making it a matter of explicit constitutional compact.”⁷⁹ This cannot necessarily be done in certain contexts, even when the constitutional rule makers engage in a rational calculus when determining rules governing wealth transfers. As will be shown, interest in the successful growth of democracy skews the rational constitutional calculus against the results sought by the fiscal constitutionalists.⁸⁰

II. The Hungarian Constitutional Court's Attempt to Employ Fiscal Constitutionalism

A. Democracy's Dawn and the Immediate Rise of Interest Group Politics

In the wake of the collapse of Communism in Eastern Europe in 1989, the former peasant landowners and the pre-Communist religious organizations were the first pressure groups to organize in the new democracies generally and in Hungary in particular.⁸¹ Even though these groups constituted minority factions,⁸² they had the optimum characteristics for effective political action. Transaction costs were low as a result of their pre-Communist organizational legacies, well-defined group interests, and access to highly motivating historical rhetoric in an era of both future uncertainty⁸³ and cynicism about the immediate past.⁸⁴ Supporters of the

79. BRENNAN & BUCHANAN, *supra* note 2, at 132 (naively concluding, “This can, of course, be done.” *Id.*).

80. Ironically, the fiscal constitutionalists claim to place concern for democratic feasibility at “centerstage.” *Id.* at 117.

81. See Klingsberg, *supra* note 28, at 893-94 & n.20 (explaining rise of “unchecked special interests” trying to resurrect pre-Communist eras and convert transition into narrow revolutionary victory) (citing TIMOTHY G. ASH, *THE MAGIC LANTERN* 146 (1990), on rise of former peasant landowner pressure groups). Legislation providing special benefits to former landowners and pre-Communist churches has been at the forefront of post-Communist legislative agendas in every former Communist country in Eastern and Central Europe as a result of this development.

82. All surveys indicate overwhelming popular opposition to these two factions and their rent-seeking. In the March 1990 elections, the Smallholders, representing the former peasant landowners, only had the support of 11.7% of the voters, while the Christian Democrats, representing the pre-Communist churches, attained a mere 6.5% of the popular vote. A Gallup survey conducted in June 1989 showed that only 18% of the population favored returning land to pre-Communist owners and only 9% of the population endorsed returning other types of property to the original owners. E. Hankiss, *Between Two Worlds*, in RESEARCH REVIEW: PROJECT NO. 2, CHANGING VALUES IN HUNGARIAN SOCIETY 55 (P. Somalai ed., 1989). Another survey conducted in March 1991 showed that two-thirds of the population opposed the concept of giving special benefits to pre-Communist property owners. See Klingsberg, *supra* note 24, at 84 n.101. The return of schools to church ownership under the terms of the Church Property Act, see *infra* note 95 and accompanying text, has outraged large numbers of parents. D. Fink, *Church and School Grapple*, BUDAPEST SUN, Mar. 25-31, 1993, at 1-2. In addition, many occupants have refused to vacate buildings turned over to a church. Edith Oltag, *Controversy Over Restitution of Church Property in Hungary*, 2 RFE/RL RESEARCH REPORT, Feb. 5, 1993, at 54, 55.

83. For discussion of the post-Communist preference for looking backward, see Ethan Klingsberg, *File Fever*, N.Y. TIMES, Nov. 22, 1993 (Op-Ed), at A11.

former peasant landowners had the additional benefit of concentration in particular geographic areas.⁸⁵

Furthermore, former peasant landholders and pre-Communist religious organizations functioned as effective pressure groups in the new legislatures because they had already incurred the startup costs of lobbying as a byproduct of other functions.⁸⁶ First, these groups incurred startup costs prior to Communism. In particular, the peasant landowners successfully organized the Independent Smallholders Party in 1920 to bring about a major land reform in 1945 favorable to their interests.⁸⁷ The former peasant landowners and churches resurrected, respectively, the Smallholders Party and the Christian Democrat Party from the pre-Communist era.⁸⁸ Second, these groups incurred startup costs running as independent political parties in the Spring 1990 elections, rather than simply functioning as non-partisan lobbying groups upon the commencement of the legislative session.

Third, they incurred startup costs by negotiating successfully for strategic positions in the Parliament's majority coalition and Council of Ministers immediately after the Spring 1990 elections.⁸⁹ Even though these two parties combined for only sixteen percent of the Parliamentary seats, their well-defined, narrow, rent-seeking agendas enabled them successfully to

84. For discussion of factors that make for an effective pressure group, see McCORMICK & TOLLISON, *supra* note 6, at 42-44; Becker, *supra* note 32; Sam Peltzman, *Toward a More General Theory of Regulation*, 19 J.L. & ECON. 211 (1976).

85. Ellen Comisso, *Legacies of the Past or New Institutions? The Struggle Over Restitution in Hungary* 7, Paper Presented at University of Chicago Conference on Restitution in Eastern Europe (June 18-19, 1993) (copy on file with author) (concentration of Smallholder supporters in eastern and southern Hungary: Bekes, Bacs-Kiskum, and Somogy); see MUELLER, *supra* note 37, at 239 (citing geographic concentration as significant factor lowering organizational costs for pressure groups).

The former peasant landowners also had an extremely energetic political entrepreneur enthusiastically pressing for their special interests as he sought to advance his own public position.

86. Robert D. Tollison sets forth this thesis that groups enjoy an advantage in rent-seeking competition when they have already incurred the startup costs of lobbying as a byproduct of some other function. See Tollison, *supra* note 37, at 575, 590.

In political science jargon, these special interests were no longer "pressure groups" engaged in "lobbying," but "one-issue parties" once they incurred the start-up costs of representing their interests by forming their one-issue political parties. For purposes of this analysis, however, they were still functioning as pressure groups bargaining in the legislature, and therefore this article sometimes strays from the technically correct jargon.

87. This was Hungary's only major land reform prior to Communist reforms and abuses. See generally Klingsberg, *supra* note 24, at 105 & n.158 (citing historical sources). The Christian Democrat Party was also a "sleeping beauty" party that represented church interests in the political arena both prior to and following Communism.

88. Reliance on the pre-Communist reputations and rhetoric of these parties was more significant than resurrection of the actual pre-Communist apparati of these parties. To a certain extent, surviving Communist era (1960s) agricultural structures also facilitated the organization of some former peasant landowners.

89. In Hungary, Smallholders have influence in the Agriculture Ministry, and Christian Democrats headed government affairs in connection with religion and religious education. See Karoly Okolicsanyi, *Hungarian Compensation Off to a Slow Start*, 2 RFE/RL RESEARCH REPORT, Mar. 12, 1993, at 49, 52; Olta, *supra* note 82, at 56.

bargain their way into the ruling coalition. Their coalition partner, the Hungarian Democratic Forum (forty-two percent of the seats), had to agree to endorse only single wealth transfers to win the support of each of these factions. Furthermore, structural characteristics of the new Hungarian legislature—unicameralism and lawmaking, in most instances, by simple majority⁹⁰—facilitated the capacity of discrete factions to ensure the passage of legislation furthering their respective interests.⁹¹ Thus, by the time it came to parliamentary bargaining for special interest legislation in the summer of 1990, the organizational costs for these groups were minimal.

The ensuing efforts by the Hungarian Parliament to provide benefits to these two groups, under the auspices of providing “restitution” or “compensation” to victims of Communist era property confiscations, gave rise to the new democracy’s first controversy over special interest legislation. Although the enactments had such labels as “restitution” and “compensation,” which “concerned defining the meaning of justice in the post-socialist political order”⁹² and alluded to questions of national self-definition, what was really at stake was “the crass economic issue” of “who would get how much” out of the new democratic system.⁹³ In both the Compensation Act⁹⁴ and the Church Property Act,⁹⁵ the ruling parliamentary coalition responded to pressure from its minority factions (the Smallholders

90. See Hungarian Constitution, *supra* note 60, ch. II, art. 24; *cf. id.* ch. XII, arts. 58-63, 65, 68-69, 70/C, 70/H.

91. BUCHANAN & TULLOCK, *supra* note 20 (discussing institutional effect of different lawmaking structures on capacity for special interest rent-seeking).

92. Comisso, *supra* note 85, at 30.

93. *Id.* The use of the terms “restitution” and “compensation” throughout this Article is potentially misleading. This Article uses these terms solely as labels or as indices, rather than as semantic or actual descriptions of the legislative transfers to the former peasant landowners and pre-Communist churches. These special interest benefits were never deemed to be inherent entitlements stemming from the contemporary validity of those groups’ pre-Communist property rights, except in some unpopular speeches on the floor of Parliament. See *supra* note 82 (public sentiment on claims of pre-Communist landowners and churches); *infra* text accompanying note 145 (describing Comisso’s analysis of “historical continuity” aspects of compensation acts). Instead, these legislative transfers were consistently categorized as “ex gratia benefits,” see, e.g., Judgment of Apr. 20, 1991 (Compensation Case II), Alkotmánybíróság [Constitutional Law Court], No. 16/1991 (IV.20)AB § III(2) (Hung.) (official translation on file with the author) [hereinafter *Compensation Case II*] or “government created entitlements” in U.S. legal terminology, *Board of Regents v. Roth*, 408 U.S. 564, 577 (1972) (explaining how “independent sources such as state law” create entitlements). For more discussion of the legal determination that these transfers were not mandated restitutionary compensation, see *infra* note 105.

94. Act on Partial Compensation for Damages Unlawfully Caused by the State, No. XXV (1991) (Hung.) (enacted June 26, 1991) [hereinafter *Compensation Act*] and Government Decree 104/1991 (Hung.) (Aug. 3, 1991) (copies of original Hungarian, as well as German and English translations, on file with the author).

95. Act Concerning the Property Situation of Formal Church Ownership, No. XXXII (1991) (Hung.) [hereinafter *Church Property Act*], cited in Judgment of Feb. 12, 1993 (Church Property Case), Alkotmánybíróság [Constitutional Law Court], No. 4/1993 (II.12) § A(3) (Hung.) (official translation on file with the author) [hereinafter *Church Property Case*].

and the Christian Democrats, respectively) to create special entitlements on behalf of distinct minority interests: pre-Communist peasant landowners and pre-Communist churches. The initial Smallholder bill provided for "re-privatization" or return of land confiscated during Communist agricultural collectivization drives, while the Christian Democrats advocated the return of church property seized pursuant to Communist nationalization policies. The enacted versions contained watered-down versions of these proposals. The former landowners received "compensation coupons"⁹⁶ sufficient to purchase some of the property that had been confiscated by the Communists, while the churches received their old buildings but not their old land.⁹⁷

The enactments provided these narrow benefits at the expense of the majority⁹⁸ and most probably, although it has never been calculated scientifically, the public interest. The property giveaways and their accompanying administrative costs⁹⁹ contributed to the dangerously high deficit¹⁰⁰

96. Compensation Act, *supra* note 94, para. 5.

97. *Church Property Case*, *supra* note 95, § I(2)(c).

98. The Compensation Act provides approximately \$1.7 billion worth of property rights to the 608,000 individuals with validly filed claims. Approximately 826,000 people filed claims. Okolicsanyi, *supra* note 89, at 49-52. Accordingly, only about 4% of the population will receive a direct benefit. Moreover, the 608,000 claim figure represents a greater number of beneficiaries than the Smallholders who sponsored and supported the initial version of the Act. The figure includes 30,000 foreigners, as well as victims of pre-1949 takings (due to the Constitutional Court intervention explained *infra* part IV) and victims of political persecution covered in a compensation act passed on May 12, 1992 and not covered in this article. *Id.*

The Church Property Act provides for the return to religious organizations of all buildings confiscated by the state after January 1, 1948. The churches also receive financial aid for reconstruction. Thus, the churches receive their former places of worship, monasteries, hospitals, dormitories, senior citizens' homes, schools, and nurseries, but not their former huge tracts of open land. Thirteen churches have submitted 6,200 claims. Over half of those claims come from the Catholic Church. The 1993 budget allocates 2 billion forint (\$20 million) for restitution of church property, plus a large part of the 3 billion forint (\$30 million) budget for church activities goes to funding the use of the returned buildings. Yet, even this significant slice of the national budget is proving inadequate to satisfy the entitlements the Parliament has granted to the Church. Oltaý, *supra* note 82, at 54-57. Arguably the provision of benefits to the pre-Communist churches has a greater claim to serving the general welfare than the provision of benefits to former peasant landowners because of the nature of church endeavors. However, many of those who had been using buildings, especially education related structures, that have been re-possessioned by the church may disagree. See *supra* note 82. Both of these statutes were compromises of the strong demands originally made by the respective special interests. See *infra* part III.A.

99. The administrative costs of the Compensation Act are staggering. The Compensation Office employs 1,500 people, which is twice as many as the central office of the Agriculture Ministry, and the Office had a budget in 1992 of 1.9 billion forint (\$19 million). Okolicsanyi, *supra* note 89.

100. Hungary has Eastern Europe's largest per capita debt. The gross external debt at the end of 1993 was estimated at 24.5 billion U.S. dollars by the Office of Economic Cooperation and Development, up from 20.4 billion U.S. dollars at the end of 1989, as reported by the United Nations Economic Commission for Europe. See Data Sheet of the United Nations Economic Commission for Europe (on file with the author).

and inflation rate.¹⁰¹ Moreover, the laws gave the select beneficiaries an advantage over the majority of individuals and private organizations in the new free market of economic and ideological competition.¹⁰² Thus, the transfers failed from both utilitarian and egalitarian perspectives.

The Constitutional Court's first response to a restitution bill was the October 1990 advisory opinion *Compensation Case I*,¹⁰³ holding, inter alia, that the Constitution's equal protection clause¹⁰⁴ prohibits special interest transfers unaccompanied by a formal cost-benefit calculation showing why the transfer is necessary for the public good and superior to a non-discriminatory transfer.¹⁰⁵ This holding contained elements of two strategies for combatting special interest transfers. The first strategy was the Court's employment of a presumption that legislation providing benefits to a particular group, as opposed to addressing a common pool matter, is beyond the constitutional authority of Parliament on grounds of inequity. The Court put the burden on Parliament, rather than the opponents of the legislation (as is effectively the case today in the United States), of showing that the wealth transfers favor "the total social result," rather than just a particular group.¹⁰⁶

This presumption reflects the approach to constitutional law advocated by the fiscal constitutionalists.¹⁰⁷ Indeed, Buchanan explicitly calls for "[t]he extension of equity norms to public spending, to the distribution

101. The inflation rate in Hungary from February 1992 to February 1993 was 23.3%. Report of Hungary's Central Statistical Office (copy of official data on file with the author).

102. One commentator has gone so far as to characterize the "aggregate economic effect" of this legislation as "a virtual revolution in property rights over land." Comisso, *supra* note 85.

103. Judgment of Oct. 4, 1990 (Compensation Case I), Alkotmánybíróság [Constitutional Law Court], No. 21/1990 (X.4) (Hung.) (official translation on file with the author) [hereinafter *Compensation Case I*]. This article refers to this decision as an advisory opinion, because it was issued pursuant to the Court's authority to review bills upon the request of specified legislative and executive branch officials. For discussion of the Constitutional Court's jurisdiction, see Klingsberg, *supra* note 24, at 55-63.

104. Hungarian Constitution, *supra* note 60, art. 70/A(1).

105. *Compensation Case I*, *supra* note 103, § V(b). The Court has consistently held that no inherent rights exist to restitution or return of pre-Communist property—i.e., the property reforms of the Communist era, however unethical, will not be looked upon as invalid. In the absence of an inherent right to restitution based upon the resurrection of pre-Communist rights, a legitimate government interest is necessary to justify these entitlements under the equal protection clause. For analysis of the jurisprudential roots of this reasoning, see Klingsberg, *supra* note 24; *infra* note 157. For analysis of the development of this reasoning by the Court in various decisions after October 1990, see Ethan Klingsberg, *Safeguarding the Transition*, 2 E. EUR. CONST. REV. 44 (1993). While refusing to retroactively hold nationalization and collectivization unconstitutional, the Constitutional Court has always noted that property owners (and their heirs) who lost property in violation of Communist era law could attempt to make a case in civil court for restitution based upon Communist era law. See *Compensation Case II*, *supra* note 93 (Zlinsky, J., concurring) (discussing *Compensation Case I* majority opinion) (English translation on file with the author).

106. *Compensation Case I*, *supra* note 103, § V(b).

107. See *supra* part I.

of benefits among persons."¹⁰⁸ The Constitutional Court did precisely this by applying strictly the equal protection clause to Parliament's attempts at a version of distributional justice.

The second strategy employed by the Constitutional Court for combating special interest transfers was the implementation of a mechanism for overcoming the transaction costs that serve to facilitate the power of special interest groups in legislatures. That mechanism is a public cost-benefit analysis of the legislative wealth transfer.¹⁰⁹ Such an analysis serves to demystify the worthiness of the special interest group's cause and to facilitate the organization and dissemination of information necessary for effective majority opposition.¹¹⁰ The Court's holding mandated that Parliament sponsor such an analysis before any legislative wealth transfer could become valid law.

B. Rejection and Retreat

The Court's *Compensation Case I* holding went unheeded in Parliament and in the public debate. The highly emotional and inexperienced Parliament could not possibly compose or adhere to the cost-benefit analysis mandated by the Court.¹¹¹ Moreover, the peasant and religious special interest groups were relentless. They launched campaigns in the media against the Court and all others who stood in the way of their sought after wealth transfers.¹¹²

Months after *Compensation Case I*, the members of the ruling coalition in Parliament were still hotly debating precisely how to compensate pre-Communist landowners and churches. A contingent of opposition MPs realized that the bills under debate were all in direct violation of the Constitutional Court's October 1990 decision and decided to put an end to

108. Buchanan, *supra* note 20, at 24.

109. At a seminar in New York in 1991, Chief Justice Lazslo Solyom reiterated, in response to a puzzled questioner, that he actually intended the *Compensation Case I* opinion to require Parliament to produce a formal "more favorable total social result" calculation to justify passing a bill that presented a special entitlement to a particular group. Conversation with Professor Andrew Arato (New York, Spring 1992).

110. See POSNER, *supra* note 19, at 622 (requiring strict means-end connection in all equal protection review would require legislation to set forth the statutory benefits to special interest sponsor and "would reduce the information costs of opposition to special interest legislation").

111. For similar tales of resistance to cost-benefit analysis of regulations prior to promulgation in countries emerging from authoritarianism and a clientelist state-run economy, see Peter Schuck & Robert E. Litan, *Regulatory Reform in the Third World: The Case of Peru*, 4 YALE J. ON REG. 51, 66-67 (1986). Schuck and Litan also discuss resistance in the United States. *Id.* at 66 n.29.

112. For a survey of media opposition to the Constitutional Court and constitutional visions contrary to the Smallholders' and Christian Democrats' special interests, as well as a feeling for the intense emotions that accompanied those Parties' approaches to their respective bills, see ANDREW ARATO, *REVOLUTION, RESTORATION, AND LEGITIMATION: IDEOLOGICAL PROBLEMS OF THE TRANSITION FROM STATE SOCIALISM* (1993) (copy on file with the author).

One opposition proposal, which was rejected, was in accordance with the Court's *Compensation Case I* holding. That proposal would have provided equal grants to all citizens.

the ongoing debates by submitting to the Court in March 1991 the first petition for pre-enactment review of a bill as provided for in the jurisdiction provisions of the Act on the Constitutional Court.¹¹³ The petition challenged only the proposals to compensate former peasant landowners, but the ramifications for compensating churches were clear.

In April 1991, the Court responded with the *Compensation Case II* decision.¹¹⁴ This opinion purported to evade direct review of the proposals on ripeness grounds, explaining that a "final" bill did not yet exist, and that therefore pre-enactment review would be premature.¹¹⁵ But the Court did take the occasion "to summarize its theoretical stance . . . without rendering a decision on the constitutionality of the provisions" currently being debated by the Parliament.¹¹⁶ The ensuing summary offered the first sign of the Court's retreat from the *Compensation Case I* opinion. The Court stated: "[T]he only thing that may be required is that a reasonable cause for any unequal treatment shall be shown, i.e. to show that such a treatment does not qualify as arbitrary."¹¹⁷ The *Compensation Case I* opinion's mandate that Parliament produce a cost-benefit calculation establishing a positive sum gain for the "total social result" had apparently been replaced by a "reasonableness" standard couched in deferential language similar to that of post-*Lochner* U.S. substantive due process case law.

Over the next few months Parliament finally passed laws granting special benefits to pre-Communist landowners and churches.¹¹⁸ The Court's subsequent review of these laws in June 1991,¹¹⁹ February 1993,¹²⁰ and

113. See Klingsberg, *supra* note 24, at 60-61 (discussing pre-enactment review of jurisdiction of Court).

114. *Compensation Case II*, *supra* note 93.

115. *Id.* § II(2). For discussion of the significance of the "finality" requirement for pre-enactment review, see Klingsberg, *supra* note 24, at 60-61 (interpreting the Act on the Constitutional Court's provisions on pre-enactment review and comparing the situation with the Spanish Constitutional Court's procedure for pre-enactment review).

116. *Compensation Case II*, *supra* note 93, § II(2).

117. *Id.* § III(1).

118. For a review of the parliamentary acts and votes on compensation, see Okolicsanyi, *supra* note 99, at 49-52.

119. Judgment of June 3, 1991 (Compensation Case III), Alkotmánybíróság [Constitutional Law Court], No. 28/1991 (VI.3) AB (Hung.) (official translation on file with the author) [hereinafter *Compensation Case III*] (deferring to Parliament's justification for wealth transfers to pre-Communist property owners and refraining from requiring a cost-benefit analysis in support of that justification). The asserted justification was "to settle ownership rights." *Id.* § I. The Court never explained why sufficient certainty of ownership rights did not emanate from its previous holdings that pre-nationalization property rights lacked contemporary validity. *Compensation Case I*, *supra* note 103, § IV(a); Judgment of May 20, 1991 (The Nationalization Case), Alkotmánybíróság [Constitutional Law Court], No. 27/1991 (V.20) (Hung.) (official translation on file with the author) [hereinafter *The Nationalization Case*].

120. *Church Property Case*, *supra* note 95 (upholding Church Property Act by deferring to legislative justification, support for "functionality of society," without cost-benefit analysis). The Hungarian Court also upheld the Church Property Act on the Hungarian equivalent of establishment clause grounds, an area where the U.S. Court has been less deferential of late to minority interest group legislation. See *infra* notes 185-94 and accompanying text.

March 1993¹²¹ refrained from the penetrating *Lochner*-style scrutiny promised back in October 1990 and, in effect, upheld special interest wealth transfers. The Court's decisions rested on deference to the nominal legislative justifications.¹²² Although the Court added a caveat,¹²³ it abandoned the two fundamental strategies for combatting special interest legislation: the presumption of unconstitutionality and the requirement of public cost-benefit analysis.

III. The Rationality of Judicial Deference to Special Interest Politics in a Transition from State Socialism

Is there a rational explanation for the Court's shift? This question is especially important for countries emerging from state socialism, given the widely held wisdom, expressed by many prominent political economists from the West, that deference to special interest politics is irrational.¹²⁴ Three factors show why the acceptance of special interest politics and the wealth transfers that follow is actually in the best interests of Hungary and the new democracies of Eastern Europe generally.

A. Legitimacy of Parliament as a Bargaining Forum

Reinforcing the legitimacy of the new parliaments is the most urgent matter on the reform agenda in the fragile East European democracies, in which voter apathy and feelings of exclusion from the political process already run high.¹²⁵ The Court's deference to legislative wealth transfers preserves the new Parliament as a forum for bargaining among society's interest groups. Notwithstanding fiscal constitutionalism's theoretical reservations, the legislature functions as a site for contracts between the state and interest groups. If the judiciary does not enforce those contracts, the legitimacy of Parliament as a market disappears.¹²⁶

121. Judgment of Mar. 12, 1993 (Compensation Case IV), Alkotmánybíróság [Constitutional Law Court], No. 15/1993 (III.12) (Hung.) (official translation on file with the author) [hereinafter *Compensation Case IV*] (reaffirming support for deferential review of basic concept of wealth transfers).

122. For criticism of both the legislative justifications and the logic of the Court's acceptance of them, see Klingsberg, *supra* note 105.

123. See discussion *infra* part IV.

124. See *supra* part I. For example, sociologist Andrew Arato's analysis condemns these Court decisions as doing little more than "saving the influence of . . . [a] particular blackmailing minority" and creating a "constitutional crisis." Andrew Arato, Legitimation and Constitution-making in Hungary 12, 14 & n.12, Paper Presented at the American Sociological Association Annual Meeting (Aug. 16, 1993) (copy on file with the author).

125. See Stephen Holmes, *Back to the Drawing Board*, 2 E. EUR. CONST. REV. 21 (1993).

126. See William N. Landes & Richard E. Posner, *The Independent Judiciary in an Interest-Group Perspective*, 18 J.L. & ECON. 875 (1975); see also Gary S. Becker, *A Theory of Competition Among Pressure Groups for Political Influence*, 98 Q.J. ECON. 371 (1983). Just as the marketplace analogy supports a special interest bargainer's entitlement to the gains for which it has bargained in the legislative marketplace, the economic theory of "revealed intensity" can be used to argue that "success by the minority" is compatible with "democratic theory" (but not "majority rule")—i.e., it is "presumptively desirable" to reward

There is even preliminary evidence that the Hungarian public endorses the idea of the Parliament as both a forum for special interest bargaining generally and, in particular, a forum for the Smallholders and Christian Democrats to cut legitimate deals for themselves.¹²⁷ Referendum initiatives¹²⁸ to defeat the restitutionary wealth transfers repeatedly failed to garner support even though polls showed that at least two-thirds of the population did not personally favor wealth transfers to victims of nationalization and collectivization.¹²⁹ A plausible interpretation of this evidence is that the public recognized that the Smallholders and Christian Democrats had made legitimate bargains in Parliament (by supporting the ruling coalition on a number of issues in exchange for the Church Property and Compensation Acts).¹³⁰

On the other hand, the failure of the referendum initiatives could be attributed to the aforementioned transaction costs that make it so difficult for a diffuse majority to organize against a determined special interest minority. Either way, the Court has signaled to the growing number of vocal interest groups and minority factions in Hungarian politics that directing their energies toward striking a bargain in Parliament is potentially more worthwhile than detracting from the new system.

A small number of "radical" Smallholders actually left the ruling coalition in early 1991 rather than endorse the compromise statute that emerged from legislative bargaining sessions after the Court's October decision. This Smallholder spin-off group's lack of respect for Parliament as a bargaining forum was further exhibited by its adoption of ultra-nationalist, anti-semitic, authoritarian rhetoric. Had the Court invalidated the bargain obtained by the mainstream Smallholder faction that stuck with the coalition, the Court would have signalled that the uncompromising spin-off group actually had the correct attitude, since bargaining in Parliament would not be worthwhile.

While interest group economic theory predicts that certain minority special interests will obtain disproportional benefits that are not Pareto optimal, this same economic theory sets forth that these benefits will be the product of compromise.¹³¹ The mainstream Smallholders may have

benefits to those who are most willing "to expend the political resources necessary to achieve political success." Elhauge, *supra* note 21, at 65.

127. Elhauge suggests this possibility with respect to the United States. See Elhauge, *supra* note 21, at 66 n.134 (noting possibility that majority "might reject a majoritarian baseline as the standard for judging laws").

128. Pursuant to the Hungarian Constitution, *supra* note 60, ch. II, art. 19(5), an approved referendum, in which more than half of the eligible population votes, becomes binding law. A referendum can only occur after the collection of 100,000 signatures.

129. See *supra* note 82.

130. See Klingsberg, *supra* note 105 (interpreting a Constitutional Court Counselor's observation that if the Court had not abandoned the principles of *Compensation Case I*, "there would have been a revolution").

131. MUELLER, *supra* note 37, at 236; Matthew L. Spitzer, *Antitrust Federalism and Rational Choice Political Economy: A Critique of Capture Theory*, 61 S. CAL. L. REV. 1293, 1305 (1988). Gary S. Becker's economic analysis of interest group competition goes one

been a selfish "blackmailing minority," in the words of a commentator who thinks the Court should have maintained its strong stance;¹³² however, the selfishness of the mainstream Smallholders was checked by a respect for compromise necessary in pluralistic politics. The Constitutional Court's deference made way for the victory of compromisers and cooperative bargainers, rather than those with visions incompatible with pluralism.

Catering to interest group politics is especially important for the success of these new democracies in which, since the collapse of Communism, the public has shown increasing loyalty to smaller factions. In such a scenario, the necessity of building coalitions is both extremely difficult and always necessary for the existence of a majority.¹³³ If the Court had struck down the Compensation Act and the Church Property Act, then not only would the current parliamentary government have faced a successful no-confidence vote,¹³⁴ but also the fractionalized parties' capacity to bargain with confidence to form stable coalitions in the future would have been seriously hampered. The difficulty that the inexperienced and emotional parliamentarians have in forming stable majority coalitions already poses a major threat to the new democracies' capacity to address the long agenda of urgent legislative matters facing post-Communist states, as well as to the public images of these new parliaments in societies unaccustomed to instability.¹³⁵ In sum, the failure of judiciaries to ratify special interest bargains

step further to argue that the bargaining process will produce compromises that tend to make the special interest group's legislative and regulatory subsidies more efficient. Becker, *supra* note 126, at 383-86, 395-96.

132. See Arato, *supra* note 124 (fiercely criticizing Klingsberg's defense of Court's compensation decisions).

133. See Klingsberg, *supra* note 28, at 889 & n.106 (discussing fractionalization of Polish Solidarity, the Czechoslovakian Public Against Violence, and the Hungarian Democratic Forum).

134. See Paczoly, *supra* note 26, at 831 & n.56 (noting that "immediate political consequence" of a decision striking down Compensation Act would have been collapse of governing coalition).

135. Serious problems with forming stable coalitions have plagued Bulgaria and Poland, as well as Romania. The Hungarian coalition came closest to collapsing when the Smallholders threatened to leave the coalition if the ruling coalition adhered to the *Compensation Case I* opinion. See *id.* (account of Court's retreat from *Compensation Case I* opinion written by Chief Counselor of the Constitutional Court) (citing Smallholders' threats to leave the coalition as support for the statement: "In these cases, the Court became a direct actor in the interplay of political forces; it cannot ignore the possible immediate political consequences of its decisions.").

Susan Rose-Ackerman pointed to this potential problem with Buchanan's fiscal constitutionalism 10 years ago when she wrote that Buchanan "ignores the possibility of continuing government instability" if electoral restraints on wealth transfers are replaced with constitutional constraints. Susan Rose-Ackerman, *A New Political Economy*, 80 MICH. L. REV. 872, 875-78 (critiquing JAMES M. BUCHANAN, *THE LIMITS OF LIBERTY* 49-50, 77 (1975)); GEOFFREY BRENNAN & JAMES M. BUCHANAN, *THE POWER TO TAX: ANALYTICAL FOUNDATIONS OF A FISCAL CONSTITUTION* (1980); see also Elhauge, *supra* note 21, at 64-65 & nn. 129-130 ("political success by the minority might be regarded as not only desirable but necessary for the legitimacy of majoritarian rule").

A split within America's conservative law and economics camp also highlights this problem with judicial enforcement of economic rights. While some follow Buchanan's admonition that legislative wealth transfers endanger democratic ideals, see *supra* note 19, others see constitutional restrictions upon legislative wealth transfers as posing a

struck in the new legislatures could be fatal to the credibility of East European parliaments already beleaguered by disaffected populaces, increasingly fractionalized political forces, inexperience, a burdensome agenda, and a lack of respect for pluralism.

B. Judicial Capital and the Importance of Human Rights Protection in a New Democracy

The previous subsection showed how the Constitutional Court's assertion of checks upon the Parliament would hinder the transition to democracy. However, this criticism of constitutional court authority should not be taken too far. The judicial assertion of certain types of restraints upon a parliament is necessary for a successful transition. The Hungarian Constitutional Court's abandonment of an intrusive *Lochnerian* approach to wealth transfers actually served to preserve "judicial capital" for those other occasions when strong judicial review is beneficial for both the Court and the transition. To understand fully this "preservation of judicial capital" thesis, it is first necessary to review the current debate over whether constitutional courts are facilitating or hindering the transitions to democracy in Eastern Europe.¹³⁶

The argument that active constitutional courts pose threats to democratic transitions in Eastern Europe has been presented most strongly by political scientist Stephen Holmes.¹³⁷ On the other end of the spectrum, sociologist Andrew Arato harshly criticizes Holmes for "repeating the thesis of right wing authoritarians and radicals."¹³⁸ The arguments of both Holmes and Arato are incomplete. Both their points of view are overly broad in their respective skepticism of and support for a strong constitutional court. Neither distinguishes between (a) judicial review that delegitimizes parliament as a bargaining forum (i.e., judicial review that takes a *Lochnerian* approach to legislative wealth transfers)¹³⁹ and (b) judicial review that checks a parliament from alienating individuals and groups from the new democratic system and cutting them off from a Western

threat to stable government even in the United States. See *Coniston Corp. v. Village of Hoffman Estates*, 844 F.2d 461, 467 (7th Cir. 1988) (Posner, J., joined by Easterbrook, J.) ("the Constitution does not . . . outlaw the characteristic operations of democratic (perhaps of any) government, operations which are permeated by pressure from special interests"); see also Easterbrook, *supra* note 34, at 60 (citing respect for power of democratic politics as basis for his refusal to advocate, in his capacity as a professor, judicial review that suppresses special interest transfers). See generally POSNER, *supra* note 19, at 617 (describing tension between efficiency concerns and democracy).

136. Constitutional courts exist in Poland, Bulgaria, Albania, Romania, Kazakhstan, Croatia, Bosnia, and the Czech Republic. In addition, the new Kyrgyzstan Constitution provides for such a court. After the battles of October 4, 1993 in Moscow, President Yeltsin dissolved the Russian Constitutional Court, but the new Constitution includes provisions for a constitutional court. Constitutional courts have also played roles in transitions to democracy in Spain, Austria, and Germany. For an overview of some of the new constitutional courts, see Herman Schwartz, *The New East European Constitutional Courts*, 13 MICH. J. INT'L. L. 741 (1992).

137. Holmes, *supra* note 125.

138. Arato, *supra* note 124, at 16, nn.6, 16-18.

139. See *supra* part III.A.

European-style civil and political society (i.e., judicial review that indicates an exchange of the Communist regime's attitude toward human rights for the European Covenant's values).¹⁴⁰ The latter type of review is necessary for the new democracies' success, while the former is both harmful to democratic development, as shown in the previous section, and as this section argues, infringes upon a court's capacity to engage in the latter type of review.

Professor Arato criticizes departures from strict judicial enforcement of constitutional norms, including the Hungarian Court's deference in the restitution decisions, as steps toward "a majoritarian-authoritarian resolution of all major issues of the day."¹⁴¹ Technically, the Court's retreat in the compensation cases was deferential to "majoritarianism," because it enabled the will of the legislature to triumph. However, the Court's deference was not to "authoritarianism," because this was not an instance of a majority group exclusively benefitting from either the placement of a burden upon a minority faction or the obstruction of a minority faction's participation in civil or political society. Some mechanisms—such as the constitutional referendum option—permit the will of the majority to triumph over the will of a minority. In contrast, the Court deferred to the chance for a minority to use all of its bargaining power to strike a deal for itself in the legislature.¹⁴² Such bargaining is a sign of flourishing pluralism rather than authoritarianism.¹⁴³ Moreover, the Court's validation of the bargains made in the legislature actually deflects legitimacy away from those minorities, such as the ultra-nationalist Smallholder spin-off faction, that would rather receive rents through authoritarian tactics than by compromising and bargaining in the legislature.¹⁴⁴

Arato and other critics of the Court's retreat have probably deemed the Court's shift a sign of support for "majoritarian-authoritarianism" because of their opposition to the substance of the "historical continuity"

140. While some Americans would classify *Lochner*-era "economic rights" as falling within the definition of basic human rights, such rights do not fall within the general category of rights recognized in the European Covenant. Therefore, those rights are omitted from this latter category. The European Covenant only protects property rights from unreasonable or arbitrary interference. See First Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms, Mar. 20, 1952, art. 1.

141. Arato, *supra* note 124, at n.6.

142. If the Court wanted to foster a system where only the will of the majority could triumph, then it would have employed the aforementioned strategies, *see supra* part I, to facilitate the capacity of the majority to overcome the power of special interests in the legislature.

143. See Elhauge, *supra* note 21, at 65 (arguing democratic theory can be in tension with deference to majority will when a minority is more intensely interested than the majority) (citing MARTIN SHAPIRO, *LAW AND POLITICS IN THE SUPREME COURT* 219-20 (1964)).

144. See *supra* part III.A (explaining how a "radical" authoritarian-leaning faction within the Smallholders Party left the coalition rather than compromise in Parliament); *see also* Easterbrook, *supra* note 34, at 60 (explaining that if a court denies motivated interest groups "the outcome they want" after they have compromised and bargained in the legislature, then "they may find other ways to accomplish their ends, ways that impose even greater losses on the rest of us").

rhetoric of the Smallholders and Christian Democrats, rather than because of the Court's deference to a bargain struck by a minority group in Parliament. These commentators take offense at the Smallholders' claim that the peasants of 1945-47 (post-land reform and pre-Communist era) embodied the true Hungary and at the Christian Democrat reference to eras of greater church hegemony for inspiration. They argue forcefully that the post-Communist danger in Eastern Europe is not a resurrection of Communism but rather the movements inspired by such claims to historical continuity with the "real," usually ethnically homogenous, nation-state.¹⁴⁵ Such historical continuity sentiments could inspire groups to attempt to use state power to abuse the civil and political rights of groups viewed as less privileged historically. However, the Hungarian Court has never indicated that it would defer to political branches if such rhetoric led to abuses of civil and political rights. The restitution acts, moreover, were not human rights abuses, but simply special interest transfers. As Ellen Comisso's insightful political analysis shows:

[T]he main "historical continuity" arising out of the compensation acts seems to be that of small groups of individuals seeking to use the power of the state to put them in a position to collect rents from society. One cannot help but add that such a "historical continuity" is hardly a unique characteristic of either Hungary or any other state in Eastern Europe.¹⁴⁶

The criticism of the failure of judicial review to stop "blackmailing minorities" is focused more properly on the potential violations of civil liberties and human rights that may arise from intolerant lawmakers than on the innocent activity of special interest bargaining.

While Professor Arato issues overly broad calls for judicial intervention to protect democracy, Professor Holmes dismisses all judicial review in new East European democracies as necessarily weakening the precarious positions of the new parliaments. Holmes does not appear to recognize that strong judicial protection of European human rights norms and subsequent conformity to such judicial review by a parliament are necessary to sustain the legitimacy of a post-Communist legislature and the new democracy generally.¹⁴⁷ Otherwise, the populace will perceive the situation under democracy as no different from the situation under the rejected prior regime. Moreover, avenues for individual and group partic-

145. See ARATO, *supra* note 112. For a similar critique of the restitution acts throughout Eastern Europe, see Shlomo Avineri, *The New Laws: History Between the Lines*, 2 E. EUR. CONST. REV. 34, 36 (1993); see also Klingsberg, *supra* note 83 (discussing Polish dissident writer Adam Michnik's thesis that ultra-nationalist movements are actually the final stage of Communism).

146. Comisso, *supra* note 85, at 27. Although Arato labels the Smallholders "a blackmailing minority," see *supra* note 124, his frequent analyses of Hungarian legislation refrain from criticizing a single special interest victory of those factions he favors (or even the special benefits to Jews and political prisoners provided in companion statutes to the Compensation Act). Arato's distinction supports Einer Elhauge's thesis that all arguments for more intrusive judicial review of special interest legislation ultimately have a substantive baseline, rather than a source in a transcendent opposition to all special interest legislation. Elhauge, *supra* note 21, at 48-66.

147. Klingsberg, *supra* note 24, at 133.

ipation in civil and political activities critical to the democratic process will be at risk without active judicial review.¹⁴⁸ The failure of a new East European constitutional court to enforce European human rights actively would engender public apathy towards democracy and acceptance of the next wave of authoritarianism as simply more of the same.

Chief Justice Solymos deserves enormous credit—from a transition strategy, as well as from a natural rights perspective—for his commitment to making the Constitutional Court a leading agent for the implementation in Hungary of European human rights standards, many of which he claims to find in an “invisible constitution” of human dignity principles.¹⁴⁹ The Court has rectified such violations as: the centralized collection of data about citizens’ private lives, the absence of administrative courts, retroactive criminal prosecutions, capital punishment, and non-consensual union representation. This Court’s frequent checks on Parliament protect the legitimacy of the new legislature and democratic system.

Unfortunately, the crucial role of European human rights guardian is quite burdensome for an infant constitutional court in Eastern Europe, as the Hungarian Constitutional Court’s predicament reveals. Several factors underlie this burdensome predicament. The reformers of Hungary’s Communist Constitution were eager to impress the world and the domestic population that the transition was genuine, so they created a judicial review organ with vast formal power: pre-enactment, post-enactment, and advisory opinion review—compounded by loose justiciability standards.¹⁵⁰ It is the country’s only organ with the power of constitutional review, and local governments provide only a weak alternative check on the national government.¹⁵¹ Furthermore, laws, regulations, official behavior patterns, and institutions leftover from the prior regime and arising under the current regime are frequently in violation of fundamental human rights.¹⁵² As a result of these circumstances, the young Hungarian Court courageously issues dozens of declarations of unconstitutionality every year—quite a difference from the United States Supreme Court’s prudent exercise of judicial review only once in its first sixty-seven years.¹⁵³

The consequence of the Hungarian Court’s tremendous caseload and frequent historic human rights decisions is a significant degree of public

148. See generally JOHN ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* (1981).

149. For discussion of the development of this “invisible constitution” idea in Hungarian case law, see Klingsberg, *supra* note 24, at 78-81.

150. For discussion of the jurisdiction of the Court as derived from the Act on the Constitutional Court, the Constitution, and case law, see *id.* at 53-80.

151. *Id.*

152. *Id.* at 64-66 (discussing post-Communist phenomenon of widespread unconstitutionality). In fact, more violations of human rights seem to be arising under new laws than from old laws. See Andras Sajó, *Constitutionalism in Hungary*, Paper Presented at Oxford University (June 1993) (text on file with the author).

153. The United States Supreme Court first set forth the principle of judicial review in *Marbury v. Madison*, 5 U.S. 137 (1803), and then did not reassert this prerogative until it struck down an act of Congress in 1857 in *Dred Scott v. Sandford*, 60 U.S. 393 (1856).

criticism. Liberals are upset with the poor quality of the Court's legal reasoning,¹⁵⁴ which stems from a combination of overwork and inexperience. Occasionally, parliamentarians rally against the Court for stealing their spotlight in leading the transition. Most significantly, these courageous human rights decisions, even if they are generally popular and accepted, earn the Court an increasingly angry pool of enemies in the political arena, particularly in the ultra-nationalist factions within the ruling coalition.

Amid this background, the vicious criticism of the Court's October 1990 *Lochnerian* opinion on restitution was especially intimidating and endangered the Court's more pressing mission of protecting European human rights. Those seeking the wealth transfers actually proposed statutory limitations and even abolition of the Court. During this period, Chief Justice Solyom and the other justices wisely became aware that the Court would only be able to play its far more important role as European human rights guardian if it used its capital wisely.¹⁵⁵ The results of the Court's retreat from *Lochnerian* opposition to interest group bargaining and legislative wealth transfers were: the failure of the calls for the abolition and limitation of the authority of the Constitutional Court, and, most importantly, the continuation of the Court's activism on the European human rights front.

These results conform to the preliminary political economic evidence that legislatures tend to reward courts with greater independence and powers of review when those courts function effectively as guardians of legislative wealth transfers.¹⁵⁶ In sum, if Chief Justice Solyom wanted to

154. See, e.g., Sajo, *supra* note 152. The legal reasoning also suffers from the Court's puzzling reluctance to utilize fully an adversarial oral and written argument process.

155. The use of the metaphor of "judicial capital" to assess the limits upon judicial review was first used by Alexander Hamilton. THE FEDERALIST No. 65, at 278 (Alexander Hamilton) (Charles A. Beard ed., 1959) (doubting whether the judiciary "would possess the degree of credit and authority" to exercise judicial review in certain circumstances). Professor Jesse Choper has written at length on the "phenomenon of exhaustible capital":

At some point—the exact location of which is unknown, but the existence in fact virtually undisputed—the Court's continued antimajoritarian rulings will tip the balance of credit accumulation and expenditures and animate a public sentiment that it has but a gossamer claim to legitimacy in a democratic society, thus either inducing popular disregard of the Court's decisions or inspiring political forces to seek to bring it to heel, or both.

JESSE H. CHOPER, JUDICIAL REVIEW AND THE NATIONAL POLITICAL PROCESS: A FUNCTIONAL RECONSIDERATION OF THE ROLE OF THE SUPREME COURT 139-40 (1980); see also Robert McCloskey, *Economic Due Process and the Supreme Court: An Exhumation and Reburial*, 1962 SUP. CT. REV. 34, 54, 60-61 (arguing that even though post-*Lochner* principles are "inadequate," concerns for "judicial economy" lead to a "calculus" that dictates against bringing back economic due process).

In a frank account of the Court's decision to retreat from *Compensation Case I*, the Chief Counselor from the Court comments: "The Court hardly can remain untouched by the pressure weighed on it by both the press and public opinion." Paczolay, *supra* note 26, at 831.

156. Gary M. Anderson et al., *On the Incentives of Judges to Enforce Legislative Wealth Transfers*, 32 J.L. & ECON. 215 (1989) (comparing relationships between various state courts and state legislators); cf. John R. Schmidhauser et al., *The Impact of Judicial Deci-*

have his "invisible constitution" of European human rights norms, then he had to let parliamentarians play their wealth transfer games. The Court's decision to act upon this realization was not only in the best interests of judicial review, but also ultimately in the best interests of a successful transition to democracy.

C. Legislative Wealth Transfers as the Key to Economic Transition

The fiscal constitutionalist¹⁵⁷ admonition that legislatures should address only common pool problems and refrain from wealth transfers and other interferences in private markets has limited applicability to wealth transfers in the setting of a transition from Communism. Interference with private markets in the form of legislative wealth transfers (i.e., privatization of state resources) is necessary if private markets are to thrive in Eastern Europe. "Privatization" encompasses the legislative authorization of transfers to the private sector of the state's near-monopoly on rights in land, businesses, and personal property, as well as investment capital.¹⁵⁸ Indeed, the wealth transfers at issue in the Compensation Acts were distributed in the form of "privatization coupons," which enabled beneficiaries to attain rights in state properties being privatized and in turn to facilitate the rise of private sector entrepreneurs in a capital drained society.¹⁵⁹

sions: *New Dimensions in Supreme Court-Congressional Relations 1945-1968*, 1971 WASH. U. L.Q. 209, 238 (concluding that partisan considerations rather than "reverence" influence Congressional voting patterns on proposals affecting the Supreme Court). Elhauge argues that in the United States "there is little connection between judicial decisions and legislative action on judicial pay and jurisdiction." Elhauge, *supra* note 21, at 86. He cites the large number of judges and the consequent difficulty of punishing certain judges without harming the other deferential judges, as well as the unlikelihood that a particular judge will provoke the legislature's reaction. *Id.* These factors do not apply to the Hungarian scenario, however, where there is only one court engaging in judicial review.

157. See *supra* part I.

158. Article 10(2) of the Hungarian Constitution deems the use of all State property to be subject to the discretion of the lawmakers. Hungarian Constitution, *supra* note 60, ch. II, art. 10(2). Thus, the "restitution" of property to the pre-Communist owners is entirely subject to the discretion of the legislatures. See, e.g., *Compensation Case I*, *supra* note 103; *Compensation Case II*, *supra* note 93.

159. The Compensation Act "constitutes a flow of capital to private individuals who had nothing before. As such, it helps strengthen Hungary's private sector . . . [I]n one sense privatization is only a bookkeeping exercise involving a financial transfer, on paper, from state to private ownership." Okolicsanyi, *supra* note 89, at 52. In particular the distribution of compensation vouchers has caused a significant increase in the number of privately owned apartments. Moreover, the transferability of the compensation vouchers has resulted in "additional capital [being] available to Hungary's leading entrepreneurs in the form of compensation bonds bought for significantly less than their face value and then used to finance privatization deals." *Id.* Despite the temporary administrative confusion, the Compensation Act will enable agriculture to operate on the basis of (cooperative and private) property rights separate from the state.

The Church Property Act has had a less significant impact on privatization. The Church Property Act has enabled private organizations superficially to remove state responsibility for running numerous hospitals, educational facilities, and other institutions; however, the reality of the situation is that the "state provides the same amount of aid per student or patient to Church hospitals and schools as it does to their state

Hypothetically, wealth transfers from the post-Communist state to private sectors could have taken place in accordance with the *Compensation Case I* opinion's strict requirements of equal treatment and cost-benefit analyses. The transfers that would have taken place under those circumstances would have been ideal, because they would assure a degree of equity of resource distribution necessary for a thriving modern civil society.¹⁶⁰ As stated above, however, this type of ideal conduct by post-Communist legislators is highly unlikely.¹⁶¹ Emotional interest group politics seem to be higher on the agenda. Amid this background, a decision by the Court to adhere to *Compensation Case I*'s strict standards would have not only blocked sub-optimal special interest transfers, but also had the much more severe consequence of stunting the transition from state domination of resources.

The initial post-Communist wealth transfers, which are all arguably in pursuit of privatization, may even be partially justifiable under Buchanan's fiscal constitutionalist theory.¹⁶² The target of Buchanan's critiques are traditional "fiscal exchanges" in which "income is to be transferred from one set of persons to another."¹⁶³ As most individuals during these early years of post-Communism refrain from paying taxes as a result of either evasion or a near poverty level income, these transition-era transfers are more accurately characterized as transfers from the state to individuals rather than from one private person's income to another private person's pocket. While much of the anti-"distributional justice" critique still applies to these special interest grants—especially the problems of rent-seeking and ultimate inequity¹⁶⁴—such transfers are distinguishable from the typical "fiscal exchange" on the grounds of what Buchanan calls "utility interdependence;"¹⁶⁵ the non-beneficiaries receive an indirect and important

counterparts." Oltay, *supra* note 82, at 55. In addition, church ownership often removes buildings from market influences in a way similar to nationalization. Nevertheless, as the churches become more desperate for finances, they may begin to put many of their new properties to rational economic uses.

160. Klingsberg, *supra* note 28, at 895-901 (advocating constitutional review of privatization and other aspects of the transition (from state to private sector) to assure equal treatment and protect against sub-optimal domination of the transition by well-organized special interest groups like the Smallholders).

Distribution of privatization vouchers to all citizens was an attempt to add a degree of equity to the privatization processes in other Eastern European countries. These vouchers enabled all citizens to purchase shares in state property. However, even in these countries, certain privileged groups have still been able to dominate privatization due to: (a) control by select groups of mutual funds that purchase the vouchers at a low rate; and (b) the privatization of a great deal of state property by means other than vouchers, including legislative wealth transfers and exchanges of state property for capital other than vouchers.

161. See *supra* text accompanying note 111.

162. See generally *supra* part I.

163. Buchanan, *supra* note 20, at 25.

164. See part I (on rent-seeking and related problems). For a discussion of how efforts at unconstrained distributional justice, ultimately foster highly inequitable results for many of those who are initially worst off, see BRENNAN & BUCHANAN, *supra* note 2, at 112-33.

165. Buchanan, *supra* note 20, at 25.

benefit from the transfer to the special interest. Interest transfers are sub-optimal and inequitable, but the creation of a viable free market benefits even those outside the targeted special interests. Perhaps the "lesser of two evils" is the most appropriate way to describe why these transition-era transfers are superior to a more strict approach that stunts progress altogether.

IV. A Variation on the Retreat from *Lochner's* Approach to Interest-Group Politics

The Hungarian Constitutional Court may deserve credit not only for wisely retreating from the *Lochnerian* rigidity of *Compensation Case I* so that the transition to democracy and the crucial transfer of state resources to private sectors could progress,¹⁶⁶ but also for modeling its retreat in a way that minimizes the potential for sub-optimal domination of the transition by select, well-organized special interest groups.¹⁶⁷ A closer look at the Court's retreat from *Compensation Case I* is necessary to understand how the Court may have enabled the transition to progress, while inserting a degree of equality into the transfer process.

A. Deference to Justification, But Strict Review of Means

The Court now approves legislative wealth transfers based upon justifications—the pursuit of "settle[ment of] ownership rights"¹⁶⁸ (*Compensation Act*) and "functionality [of society]"¹⁶⁹ (*Church Property Act*)—that are facially weak¹⁷⁰ and unsupported by any analysis showing benefits for what the *Compensation Case I* opinion termed the "total social result." However, the Court's deference is not complete. The Court conditions approval on Parliament treating all similarly situated groups equally. If Parliament is to get away with these vague legislative justifications, then similar transfers must be provided to all other groups to whom those justifications apply. In other words, differential treatment in comparison with the general population is now constitutionally permissible; however, differential treatment in comparison with those situated similarly to the select beneficiaries is proscribed. Such an interpretation of the equal protection clause does not halt wealth transfers; it only requires the broadening of the pool of beneficiaries.¹⁷¹

166. See *supra* parts III.A-III.C.

167. See *supra* part I (on the sub-optimality of special interest wealth transfers).

168. *Compensation Case III*, *supra* note 119, § I.

169. *Church Property Case*, *supra* note 95, § III.

170. For more detailed explanations of the genealogy of those justifications and their weaknesses, see Klingsberg, *supra* note 105.

171. The source of this approach is probably Ronald Dworkin's analysis of affirmative action, with which the Chief Justice is perhaps as taken as he apparently once was with Epstein's commentary on the takings clause. SOLYOM, *supra* note 66, at 47 (citing influence of Dworkin's theory of equality). Dworkin sets forth a deferential standard for reviewing the objective of legislative action that benefits a special interest: the law must be in pursuit of "some acceptable convention of how people are treated as equals." RONALD DWORKIN, *LAW'S EMPIRE* 397 (1986). Dworkin then sets forth a second

Thus, the Court approved the Compensation Act's wealth transfers to victims of Communist era land confiscations on the condition that Jewish victims of World War II era takings, ethnic German victims of post-World War II era takings, and victims of Communist era *personal* property confiscations receive compensation on a scale equal to the compensation provided the peasant victims of real estate collectivization.¹⁷² Similarly, the Court upheld the transfer of state resources to church victims of nationalization on the condition that Parliament provide entitlements to all "public purpose organizations," including secular groups (unions, political parties) and those religious groups that lost no property to the Communists.¹⁷³

This aspect of the Hungarian Constitutional Court's approach to legislative wealth transfers constitutes a significant aberration from the United States Supreme Court's retreat from *Lochner*. While both the Hungarian and U.S. Courts now recognize the legitimacy of virtually any legislative justification for a special interest wealth transfer, the Hungarian Court has decided to treat the overinclusiveness of a justification more seriously than the U.S. Court. The U.S. Court will uphold a special interest wealth transfer supported by an overinclusive justification on the grounds that the legislature is proceeding "one step at a time" and will eventually provide appropriate benefits to all parties to whom the justification applies.¹⁷⁴ By contrast, the Hungarian Court approves the law in question on the condition that the legislature provide benefits, equal to those provided in the law under review, to all similarly situated parties. In the *Compensation Case III* decision, the Court even conditioned upholding the Compensation Act upon the legislature's compliance with a deadline for the enactment of equivalent benefit packages for the similarly situated parties not included or treated equally in the original Compensation Act.¹⁷⁵

There is potential for the Hungarian Court to interpret loosely the requirement of "equal benefits" for similarly situated groups and thereby move closer to the current U.S. system. The Hungarian Court has set

"general" requirement, which is apparently the source of the Court's requirement that the legislature must also provide benefits to all similarly situated groups who fall within the legislative objective: "Government violates this more general requirement whenever it ignores the welfare of some group in its calculation of what makes the community as a whole better off." *Id.*

172. See *Compensation Case III*, *supra* note 119; *Compensation Case IV*, *supra* note 121.

173. *Church Property Case*, *supra* note 95, § III.

174. See, e.g., *Dandridge v. Williams*, 397 U.S. 471, 486-87 (1970) (upholding underinclusive welfare plan); *Williamson v. Lee Optical of Okla., Inc.*, 348 U.S. 483, 489 (1955) (denying equal protection challenge to legislative justification on grounds that legislature will pass laws "one step at a time" to address all parties that fall within legislative justification).

175. *Compensation Case III*, *supra* note 119, § I(d)(2). A special provision in the Court's jurisdictional statute provides for prospective declarations of unconstitutionality in the event Parliament does not engage in a specific act by a deadline set by the Court. See Klingsberg, *supra* note 24, at 64-66 (analyzing Article 43 of the Act on the Constitutional Court).

forth that similarly situated groups can receive differential treatment based upon a legitimate legislative justification, and the Court may well turn out to be deferential when reviewing such justifications. However, as recently as March 1993, the Court struck down portions of the Compensation Act for treating the former owners of land better than the former owners of personal property.¹⁷⁶ Perhaps what will develop is a two-tiered level of review of legislative justifications. The deferential level would apply to review of the general justification for providing the original special interest benefit.¹⁷⁷ The strict level would apply to review of why the legislature is not providing equal benefits to all those other groups for whom the originally asserted and upheld general justification would apply.

B. An Equal Treatment Clause: An Idea Whose Time Has Come?

The Hungarian Court's adoption of this approach to equal protection scrutiny of wealth transfers, which Chief Justice Solyom calls the prohibition against "discrimination within the same regulatory concept,"¹⁷⁸ puts the Court in a position of mandating widespread positive rights. The Court's enforcement of the principle of "equal benefits for all similarly situated groups" could result in numerous orders to the Parliament to create entitlements on behalf of omitted classes. Such a development reflects the "positive rights" orientation of the Hungarian equal protection clause's text: "The Republic of Hungary shall ensure human and civil rights for everyone within its territory without discrimination of any kind."¹⁷⁹ In effect, the Hungarian Constitution sets forth an equal *treatment* clause, mandating affirmative state action to "ensure" the provision of a panoply of "human and civil rights for everyone."¹⁸⁰

By contrast, the U.S. Constitution's Fourteenth Amendment prohibition against a state decision to "deny to any person within its jurisdiction the equal protection of the laws" is phrased in terms oriented towards prohibiting the state from selectively refraining from providing the "protection" of the laws (to enforce a contract or protect a property right) that are invoked by the individual. Consistent with this reading, the U.S. Supreme Court's interpretations of the equal protection clause generally

176. *Compensation Case IV*, *supra* note 121 (striking down, on equal protection grounds, the extra state subsidies for those former landowners trying to attain pre-Communist possessions). The regulations implementing the Compensation Act can be found in Government Decree 104/1991 (Aug. 3, 1991) (copy on file with the author).

177. In *Compensation Case III*, *supra* note 119, § I(b), the very opinion in which the Court set forth this requirement of a legitimate justification for failing to extend benefits to similarly situated groups (i.e., the Jews, ethnic Germans, and former personal property owners), the Court indicated that it was not going to review strictly the legislature's general justification for providing the initial special interest transfers to former landowners.

178. SOLYOM, *supra* note 66.

179. Hungarian Constitution, *supra* note 60, ch. XII, art. 70/A.

180. *Id.* See RONALD DWORKIN, *TAKING RIGHTS SERIOUSLY* 227 (1978) (defining "equal treatment" as "the right to an equal distribution of some opportunity or resource or burden"). In the European context, "human rights" encompasses certain positive social rights.

refrain from adopting a position like that of the Hungarian Court and adhere to the American tradition against finding constitutional sources for positive rights.¹⁸¹

During eras when the central function of the state in civil society was as protector of property and enforcer of contracts, it made sense for the U.S. judiciary to refrain from interpreting the equal protection clause as containing a constitutional mandate for the equitable legislative provision of positive social entitlements. However, positive social rights have become a primary source of civil rights in post-*Lochner* America.¹⁸² Since the post-*Lochner* U.S. judiciary has permitted the unlimited growth of the welfare state and the consequent increase in importance of government-created rights in society, it is no surprise that some keen commentators have considered ways for U.S. courts to update their equal protection review to a mode pertinent to this era of positive social rights.¹⁸³ Other-

181. In the United States, positive social rights have sources only in statutes and regulations adopted at the discretion of the state, rather than a mandate in the text of the Constitution. See *Board of Regents v. Roth*, 408 U.S. 564 (1972). See generally David P. Currie, *Positive and Negative Constitutional Rights*, 53 U. CHI. L. REV. 864 (1986).

Lawrence Tribe interprets a few U.S. Supreme Court cases as embodying nondeferential equal protection review of welfare distribution pursuant to a constitutional requirement of "evenhanded" distribution of welfare benefits by the state. See LAWRENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* § 16-50 (2d ed. 1988). But see *Dandridge v. Williams*, 397 U.S. 471, 487 (1970) ("Constitution does not empower the Court to second-guess state officials charged with the difficult responsibility of allocating limited public welfare funds among the myriad of potential recipients"); Gunther, *supra* note 19, at 13-14 (discussing U.S. Supreme Court's consistent refusal to subject allocation of welfare benefits to strict equal protection scrutiny).

182. See, e.g., Thomas C. Grey, *Property and Need: The Welfare State and Theories of Distributive Justice*, 28 STAN. L. REV. 877 (1976); Charles Reich, *The New Property*, 73 YALE L.J. 733 (1964).

183. Indeed, 20 years ago Gerald Gunther set forth a proposal for "modestly interventionist" equal protection review by the U.S. Supreme Court, which is similar to the approach adopted by the Hungarian Court. Gunther, *supra* note 19, at 30-48. Gunther argued that the U.S. Court should continue to defer to legislative justifications, but should "half-way" revert to the *Lochner* era by applying stricter equal protection review to the means pursued to achieve the asserted purposes—even when the subject matter is economic rights. Gunther pointed out that his proposal should appeal to conservatives, who seek to limit inequitable state interference with private economic transactions, and to liberals, who seek more evenhanded distribution of "new property" rights. *Id.* In support of his proposal he cited an often overlooked excerpt from a Justice Jackson concurrence: "Invocation of the equal protection clause . . . does not disable any governmental body from dealing with the subject at hand. It merely means that the . . . [state action] must have a broader impact." *Id.* (quoting *Railway Express Agency, Inc. v. New York*, 336 U.S. 106, 111-13 (1949) (Jackson, J., concurring)).

Jonathan Macey offers another related approach for checking special interest transfers without reverting to the *Lochner* era. See Macey, *supra* note 44. He argues that courts should accept the "public regarding" justification of special interest statutes at face value, thereby leading to statutory interpretations that broaden the legislation's effects. Macey's proposal for checking special interest legislation is similar to the Hungarian Court's strategy in that it attempts to convert deference to the legislative justification into a means for broadening the narrow benefits of special interest transfers. Macey characterizes his approach as one of restraint, because it relies on statutory interpretation rather than constitutional review. Macey is actually quite activist, however, in that he requires courts to rewrite, on their own, special interest legislation in order to make the outcomes more equitable, while the Hungarian Court's constitutional check

wise, the equal protection clause—except for a handful of situations involving suspect classifications in the distribution of largess—is outdated in its focus on “protection” rather than “treatment,” and the legislature can serve as the source of significant inequities when distributing benefits. One of the proposals for modification of U.S. equal protection review even bears a striking similarity to the path chosen by the Hungarian Constitutional Court.¹⁸⁴

Moreover, the current U.S. Supreme Court has lately shown an inclination toward Hungarian Constitutional Court style equal treatment, although pursuant to constitutional provisions other than the equal protection clause. One of the most talked about U.S. Supreme Court decisions reviewing special interest legislation in 1994 rejected the usual deference to the principle that the legislature is proceeding with the evenhanded distribution of benefits “one step at a time,”¹⁸⁵ in favor of an approach remarkably similar to that adopted sixteen months earlier in the Hungarian Constitutional Court’s review of statutory benefits to pre-Communist churches in the *Church Property Case* opinion.¹⁸⁶ At issue before the U.S. Court in *Board of Education of Kiryas Joel Village School District v. Grumet*¹⁸⁷ was a New York law providing benefits to an enclave of Satmar Hasidim. The challenged statute appeared to be a classic example of “[un]evenhanded distribution”¹⁸⁸ stemming from successful legislative bargaining by a tightly knit minority community.¹⁸⁹ Mirroring the Hungarian Court’s equal protection analysis in *The Church Property Case* and the other

relies on the popularly approved Constitution and mandates that the legislature undertake the broadening of the laws.

The Hungarian Constitutional Court’s approach to wealth transfers does not eliminate all inequities, as seen from the fiscal constitutionalist perspective, because wealth transfers are still taking place—the only difference is that now the pool of special interest beneficiaries is wider. For a fiscal constitutionalist such an outcome is still inequitable. See *infra* note 197.

184. See discussion of Gunther, *supra* note 183.

185. *Williamson v. Lee Optical of Okla., Inc.*, 348 U.S. 483, 489 (1955).

186. See *supra* notes 118-23, 168-77 and accompanying text.

187. 62 U.S.L.W. 4665 (U.S. June 28, 1994).

188. *Id.* at 4672.

189. *Id.* at 4666, 4669 (describing “special” enactment by legislature in favor of community of approximately 8,500 persons); *Id.* at 4677 (Scalia, J., dissenting) (statute benefitted “tiny minority sect”).

As Richard Epstein has pointed out to me, the special interest legislation at issue in *Kiryas Joel* is arguably more difficult for an opponent of special interests to condemn than other products of special interest bargaining. The Satmar Hasidim sought a special interest statute (creating a special school district for educating their handicapped children), as opposed to settling for the same education subsidy for handicapped children that all other New Yorkers may receive, because, under the Supreme Court’s recent Establishment Clause jurisprudence, the only way the Satmar enclave could take advantage of the usual public education subsidy for handicapped children was through the enactment of a special school district for them. From this viewpoint, the Satmars did not seek anything that New York was not giving away to others, the Satmars just had to bargain for more in order to overcome the obstacles of recent Establishment Clause case law. In other words, disagreement with recent Establishment Clause case law may make it logical to depart from or at least less easy to justify the usual claims against special interest legislation when analyzing *Kiryas Joel*.

more recent restitution cases,¹⁹⁰ five U.S. Supreme Court Justices in *Kiryas Joel* accepted implicitly the general justification for the statute (meeting the education needs of handicapped children) and then went on to scrutinize the statute rather carefully in light of the constitutional "concern [for] whether the benefit received by the Satmar community is one that the legislature will provide equally to other religious (and nonreligious) groups."¹⁹¹ When faced with such a concern, the Hungarian Court in *The Church Property Case* and other recent restitution cases has either set a deadline for the legislature to pass additional legislation to cover overlooked similarly situated groups that have been brought to the Court's attention or, in the event no such groups have been brought to the Court's attention, permitted the statute to stand subject to future challenges identifying overlooked similarly situated groups.¹⁹² But the U.S. Court lacks the institutional flexibility to declare an enactment prospectively unconstitutional and is therefore left with only a choice between either striking down the special interest legislation as inequitable, as the Court did in the *Kiryas Joel* case, or adhering to the usual "one step at a time" view under which a court refrains from "presum[ing] that the [legislature] would not grant the same accommodation in a similar future case."¹⁹³ Given the institutional limitations of the U.S. judiciary, the broad application of the *Kiryas Joel* opinion's Hungarian style equal treatment stance would lead to the striking down of legislative wealth transfers with neo-*Lochnerian* abandon. Accordingly, the decision will be limited in precedential scope to cases where the special interest beneficiary has religious contours. Other recent decisions, however, indicate that a majority of the Court may be taking a similar turn in cases that fall within the ambit of the Commerce Clause.¹⁹⁴ Interest in a modified interpretation of the equal protection clause itself could be on the horizon. If at some point in the future the U.S. Supreme Court moves closer toward expansion of this constitutional concern for the evenhanded distribution of special interests to similarly situated groups, it may be useful to consider modifying equity jurisdiction and conceptions of separation of powers in order to permit the issuance of declarations of prospective unconstitutionality and deadlines for the legislature to add a similarly situated group to a benefit plan. The results of the Hungarian Court's attempt to implement its tempered acceptance of special interest transfers could provide significant data for both U.S. Supreme Court Justices and commentators contemplating new directions for U.S. equal protection jurisprudence.

C. Defusing the Sub-Optimality of Special Interest Transfers

In the best case scenario, the Hungarian Court's modified retreat from

190. See *supra* notes 118-23, 168-77 and accompanying text.

191. *Kiryas Joel*, 62 U.S.L.W. at 4669; *Id.* at 4673 (O'Connor, J. concurring).

192. See *supra* notes 118-23, 168-77 and accompanying text.

193. *Kiryas Joel*, 62 U.S.L.W. at 4676 (Kennedy, J., dissenting).

194. See *supra* note 18.

Lochner will diffuse the sub-optimality of special interest transfers¹⁹⁵ in two ways. First, the Court's approach will increase the burden upon interest groups seeking wealth transfers from the legislature. Wealth transfer proposals will now carry with them the requirement of providing benefits not only to the well-organized interest group at the bargaining table, but also to a contingent of similarly situated free riders. This increase in the cost of any single transfer scheme may serve to decrease the sum total cost of transfers in the long run. As interest group theory points out, one of the reasons transfers to small factions are so easily enacted is that each transfer usually only entails a small cost.¹⁹⁶ The rent-seeking interest group's new burden will cause the legislature to be more circumspect about underwriting special interest transfers.

The second way the Court's strategy will potentially diffuse the sub-optimality of special interest transfers is by assuring that transfers reach a wider portion of the population than just the most well-organized interest groups. As the majority's burden benefits a greater number, the gains from the wealth transfer may increase to such a degree that the proportional costs to the majority (and the wealth transfer's sub-optimality) decrease.

Under this best case scenario, the Court's modified retreat from *Lochner* will insert a dose of equality into the transition that is necessary to prevent a particular interest group from "stealing the revolution" and bringing back clientelism. Meanwhile, the Court will avoid placing a direct and rigid *Lochnerian* check on special interest transfers and therefore will be unlikely to trigger the three dangers described in part III (delegitimation of Parliament as a bargaining forum, causing a serious backlash against the Court's capacity to enforce basic human rights, and inhibition of the post-Communist transfer of state resources to the private sector).

On the other hand, the Hungarian Court's path may lead to insurmountable administrative costs and require interference with the legislature to a degree that brings about the part III dangers listed above. And if those obstacles do not hinder the Court from implementing its stated strategy, then the Court could end up simply compounding the sub-optimality of interest group politics by substantially increasing the cost of special interest transfers, while still neglecting to assure that the aim of legislation is to benefit the "total social good."¹⁹⁷ For better or worse, the results are sure to be instructive.

195. For explanations of the sub-optimality of special interest transfers by the legislature, see part I.

196. MCCORMICK & TOLLISON, *supra* note 6, at 127.

197. See BUCHANAN & TULLOCK, *supra* note 20, at 293-94 (criticizing attempt to address needs of all minority special interests as opening "a veritable Pandora's box," because "excessive costs will be imposed on the whole population").

However, as post-Communist societies and Hungary in particular become increasingly factionalized, the idea of a law that serves the "total social good" seems increasingly mythical and interest group politics appear more natural.

Conclusion

For now at least, the Hungarian Constitutional Court has handled the issue of special interest wealth transfers, raised by restitution legislation, in a manner that permits: (1) Parliament to continue to function as a legitimate bargaining forum; (2) the Court to continue to function as a strong guardian of European human rights standards in many instances; and (3) the transfer of resources to the private sector to continue in a manner with at least some respect for equity and optimality. Each of these three factors is essential to the success of democracy. The first result is particularly important as members of East European societies confront the challenge of seeing themselves as members of groups that can bargain with each other, as opposed to atomized masses ready to be mobilized by an unpromising demagogue. Interest group bargains look bad when they are contrasted with the public good,¹⁹⁸ but they look good when contrasted (more realistically) with the uncivil identity politics that plague post-Communist democracies.

This analysis of the path taken by the Hungarian Constitutional Court shows how a number of contextual factors render traditional and highly praised political economic axioms about the optimal constitutional approach to interest group wealth transfers misguided. Moreover, the Hungarian Court has diverged slightly from the United States Supreme Court's path away from *Lochner* in a manner that may well be significantly more optimal. This analysis should be valuable not only for a better understanding of how to conduct a successful transition to democracy—a topic of increasing importance in post-Communist Europe and many other locales across the globe—but also for those political economists who have been quick to make universal pronouncements without sufficient reference to context. As democracy spreads, such re-evaluation of what American experts once thought to be universally applicable counsel will become increasingly important.

198. Stephen Holmes has pointed out to me that this prejudice in favor of the public good and against bargains is a legacy of Communist era thinking. See also *supra* note 26 and accompanying text (discussing influence of Communist era thought on equal protection analysis).